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"THE GOOD MOTHER"¹: MOTHERING, FEMINISM, AND INCARCERATION

DESERIEE A. KENNEDY*

ABSTRACT

As the rates of incarceration continue to rise, women are increasingly subject to draconian criminal justice and child welfare policies that frequently result in the loss of their parental rights.² The intersection of an increasingly carceral state and federally imposed timelines for achieving permanency for children in state care has had a negative effect on women, their children, and their communities. Women, and their ability to parent, are more adversely affected by the intersection of these gender-neutral provisions because they are more likely than men to be the primary caretaker of their children.³ In addition, incarcerated women have higher rates of substance abuse, domestic violence, and childhood and domestic abuse that make it more difficult for them to comply with federal and state standards for retaining their parental rights.⁴ Incarcerated mothers must also struggle against stereotypes of mothers and effective mothering which may be at play in parental termination decisions. This article suggests that feminists need to look more closely at these issues and proposes changes to arrest, sentencing, and parental rights hearings that would help incarcerated women maintain their connection with their children and preserve their parental rights. The article suggests a community-based approach to caring for the children of incarcerated women that would help empower women and their communities.

INTRODUCTION

- I. WOMEN, CRIME, & THE CRISIS IN FAMILIES**
- II. BARRIERS TO PRESERVING FAMILY UNITY IN FAMILIES WITH AN INCARCERATED MOTHER**

1. SUE MILLER, *THE GOOD MOTHER* (1986).

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2. *See, e.g.*, *State Dep't of Children's Servs. v. V.N.*, 279 S.W.3d 306, 323 (Tenn. Ct. App. 2008) (noting the loss of parental rights for the petitioner).

3. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 4 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>.

4. *Id.* at 7.

III. DEVELOPING A CRITICAL RACE FEMINIST APPROACH TO RESOLVING THE TENSION BETWEEN PRESERVING PARENTAL RIGHTS AND ENSURING THE BEST INTERESTS OF THE CHILDREN

CONCLUSION

INTRODUCTION

On August 22, 2007, when Omarian was four years old, the Commissioner of Children and Families filed a petition seeking the termination of the parental rights of Omarian's mother, Caliphah.⁵ Caliphah was thirty-four years old and had a record with the Department of Children and Services that included shoplifting with her children and domestic violence.⁶ When Omarian was about two years old, Caliphah was sentenced to four years in federal prison for forgery, criminal impersonation, larceny and illegal entry into the United States.⁷ Caliphah placed Omarian with his aunt, but after concerns about the quality of his care, the State removed Omarian and placed him with foster parents.⁸ Caliphah maintained her desire that Omarian be raised by her relatives until she could regain custody of him upon her release, but the court determined that she failed to maintain sufficient ties to her son.⁹ Despite testimony from Caliphah asking that her ties not be severed and stating that his Aunt was willing to care for the child, the court found that Caliphah's parental rights should be terminated.¹⁰ The Court was persuaded by four-year-old Omarian's unwillingness to visit his mother in prison or the siblings he barely knew and found that Caliphah had "abandoned" Omarian by failing to maintain consistent contact with him while in federal prison.¹¹ The court stated that Caliphah

has not provided financial support to the child and has not maintained consistent visitation and contact with [Omarian]. . . . There was no evidence that the mother sent cards, gifts or letters

5. *In re Omarian R.*, No. H14CP06008614A, 2008 Conn. Super. Ct. LEXIS 1427, at *1 (Conn. Super. Ct. June 2, 2008). The Connecticut statute at issue in the case allows the termination of parental rights based on a finding of abandonment. According to the court, a court may find abandonment if a parent "failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child." *Id.* at *21 (citing CONN. GEN. STAT. § 17a-112(j)(3)(A) (2011)). "Indicia of interest, concern and responsibility include '[a]ttempts to achieve contact with a child, telephone calls, the sending of cards and gifts, and financial support . . .'" *Id.* at *21-22.

6. *Id.* at *8.

7. *Id.* at *9.

8. *Id.* at *9-10.

9. *Id.* at *14, 25.

10. *Id.*

11. *In re Omarian R.*, 2008 Conn. Super. Ct. LEXIS 1427, at *10-11, *19, *22-23.

to the child or participated in the child's education or shown [sic] an interest in his health or welfare. The mother has not provided a domicile for the child, did not provide food, medical shelter or clothing for the child, nor offered a specific plan to provide those basic necessities for her son.¹²

Caliphah, who was scheduled to be released from prison one year later, faced the loss of her child and deportation.¹³ Caliphah's story is strikingly similar to the vastly increasing numbers of women and mothers in prison who frequently are faced with challenges to their parental rights while in prison.¹⁴

Women, and in particular poor women and women of color, are uniquely and disproportionately affected by the intersection of criminal policies that rely heavily on incarceration and child welfare policies designed to achieve permanence for children in state care.¹⁵ The number of women who are under criminal supervision has grown dramatically over the last twenty years.¹⁶ These women are often more likely to have been the primary caretakers of their children prior to incarceration than incarcerated fathers.¹⁷ Unlike male prisoners with children, who can often rely on the child's mother to continue to care

12. *Id.* at *23.

13. *Id.* at *16–17.

14. See, e.g., *State Dep't of Children's Servs. v. V.N.*, 279 S.W.3d 306, 323 (Tenn. Ct. App. 2008) (affirming termination of parental rights of incarcerated mother and remanding for collection of costs assessed against the mother).

15. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: WOMEN IN PRISON 6 (1994), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/WOPRIS.PDF> (finding an incarcerated woman of color more likely to be a mother with a minor child than white women).

16. NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* 33 (2005) (finding women to be the fastest-growing prison population); GLAZE & MARUSCHAK, *supra* note 3, at 3 ("[P]arents in prison had nearly 1.9 million children . . ."); CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf> (finding an increase of 500,000 from 1991 to 1999); Katherine P. Luke, *Mitigating the Ill Effects of Maternal Incarceration on Women in Prison and Their Children*, 81 *CHILD WELFARE* 929, 931–32 (2002) ("[I]ncarceration rates of women have risen by more than 400% in the past 20 years."); Jeremy Travis, *Families and Children*, 69 *FED. PROBATION* 31, 33 (2005) ("Between 1991 and 2000, the number of incarcerated mothers increased by 87 percent, compared with a 60 percent increase in the number of incarcerated fathers."); Erica D. Benites, Comment, *In Defense of the Family: An Argument for Maintaining the Parental Rights of Incarcerated Women in Texas*, 3 *SCHOLAR* 193, 194 (2001) (analyzing Texas parental terminations based on parental incarceration). One study found that three-quarters of all women in prison were mothers, most of whom had experienced physical or sexual abuse before imprisonment, committed a drug offense, were in prison for a non-violent offense, and/or committed their crime under the influence of drugs or alcohol. SNELL, *supra* note 15, at 1, 5.

17. Mothers in prison are far more likely than men in prison to report having lived with their children before incarceration. In addition, mothers were more often a single parent. See GLAZE & MARUSCHAK, *supra* note 3, at 4, 5.

for the child and foster communication between the father and the child during incarceration, incarcerated mothers more often must rely on extended family or the state to care for their children while incarcerated.¹⁸ In addition, these women and their families are frequently dealing with socioeconomic stresses, addiction, and histories of abuse, at higher rates than male prisoners.¹⁹ Frequently there are insufficient resources to address these problems and to assist these women in keeping their families together.²⁰ The dearth of resources at a familial or community level and the need to depend on state assistance to provide childcare for their children prior to, during, and after their incarceration make incarcerated women extremely vulnerable to having their parental rights permanently severed during their incarceration.²¹

18. Benites, *supra* note 16, at 218–19.

19. GLAZE & MARUSCHAK, *supra* note 3, at 7 (“Mothers in state prison [are] more likely than fathers to report homelessness, past physical or sexual abuse, and medical and mental health problems.”).

20. See, e.g., *In re Gwynne P.*, 830 N.E.2d 508, 520 (Ill. 2005) (finding an incarcerated mother unfit because of drug, alcohol use, and incarceration); Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631, 644–48 (2005) (describing inadequacy of state and local resources for drug addicts).

21. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 471, 94 Stat. 500 (1980). In addition, some estimate that 34 states have statutes that include parental incarceration as a factor in terminating parental rights. See BERNSTEIN, *supra* note 16, at 150. The following statutes allow courts to consider incarceration or conviction as a factor to be considered in parental termination proceedings: ALA. CODE § 12-15-319(a)(4) (LexisNexis 2010); ALASKA STAT. §§ 47.10.011(2), 47.10.088 (2010); ARIZ. REV. STAT. § 8-533(B)(4) (LexisNexis 2010); ARK. CODE ANN. § 9-27-341(b)(3)(b)(viii) (2011); CAL. FAM. CODE § 7825 (Deering 2010); COLO. REV. STAT. § 19-3-604(1)(b)(III) (2010); DEL. CODE ANN. tit. 13, § 1103(a)(5)(a)(3) (2011); D.C. CODE §§ 16-2353, 16-2354(b)(3)(C) (LexisNexis 2010); FLA. STAT. ANN. § 39.806(2)(d) (LexisNexis 2010); GA. CODE ANN. § 15-11-94(b)(4)(B)(iii) (2011); IDAHO CODE ANN. § 16-2005(1)(e) (2010); 705 ILL. COMP. STAT. ANN. 405/1-2 (LexisNexis 2011); 750 ILL. COMP. STAT. ANN. 50/1(D)(r) (LexisNexis 2011); IND. CODE § 31-34-21-5.6(b)(3) (LexisNexis 2011); KAN. STAT. ANN. §§ 38-2269(b)(5), 38-2271 (2010); KY. REV. STAT. ANN. § 600.020(2)(b) (LexisNexis 2010); LA. CHILD. CODE ANN. art. 1015(6) (2011); ME. REV. STAT. tit. 22, § 4055 (2010); MD. CODE ANN., FAM. LAW § 5-525.1(b)(1)(iii) (LexisNexis 2010); MASS. ANN. LAWS ch. 119, § 26(c) (LexisNexis 2011); MASS. ANN. LAWS ch. 210, § 3(c)(xiii) (LexisNexis 2011); MICH. COMP. LAWS § 712A.19b(3)(h) (2010); MISS. CODE ANN. § 93-15-103(3)(g) (2010) (as interpreted in *Vance v. Lincoln Cnty. Dep’t. of Pub. Welfare*, 582 So. 2d 414, 418 (Miss. 1991) (“Imprisonment, and the resulting conditions, can be rightfully considered as a significant factor when determining whether rights may be terminated.”)); MO. REV. STAT. § 211.447 (7)(6) (2010); MONT. CODE ANN. §§ 41-3-423, 41-3-609(1)(c) (2010); NEB. REV. STAT. ANN. § 43-292(10)-(11) (LexisNexis 2010); NEV. REV. STAT. ANN. §§ 128.105, 128.106(6), 432B.393 (LexisNexis 2010); N.J. STAT. ANN. §§ 30:4C-11.2(a)(2), 30:4C-15 (West 2010); N.C. GEN. STAT. § 7B-1111(a)(8) (2010); N.D. CENT. CODE §§ 27-20-02(3)(f), 27-20-44 (2010); OHIO REV. CODE ANN. § 2151.414(E) (13) (LexisNexis 2010); OKLA. STAT. tit. 10A, § 1-4-904(12) (2010); OR. REV. STAT. § 419B.504(6) (2010); 23 PA. CONS. STAT. § 2511(a)(9) (2010); P.R. LAWS ANN. tit. 31, §§ 634a(8), 634b (2010); R.I. GEN. LAWS § 15-7-7(a)(2)(i) (2010); S.D. CODIFIED LAWS §§ 26-8A-26.1(4), 26-8A-27 (2010); TENN. CODE ANN. § 36-1-113(1)(A) (2010); TEX. FAM. CODE ANN. §§ 161.001(Q),

Mothers with limited family resources for childcare and assistance are most at risk for having their children enter state care either prior to or during their incarceration.²² Once a child is in foster care, federal laws which limit the period of time a child may be in foster care propel a state to move to terminate the parental rights of an incarcerated parent under a federally mandated time-line.²³ In this way, federal and state law and policy intersect to place families of incarcerated mothers and their communities in crisis by making the families vulnerable to parental termination.²⁴ The issue of how to balance the need of the children for stable caring communities and the parental rights of incarcerated women remains unresolved. In fact, terminations of parental rights of women who have come into contact with the criminal justice system have increased dramatically since 1991.²⁵ Yet, this rise in terminations has not resulted in a comprehensive and systematic governmental response to assist these families.²⁶ Nor has there been a corresponding increase in adoptions for these children.²⁷ The

161.002(b), 161.007 (West 2010); UTAH CODE ANN. §§ 78A-6-507, 78A-6-508(2)(e) (LexisNexis 2010); VT. STAT. ANN. tit. 15A, § 3-504(a)(3) (2010); VA. CODE ANN. § 16.1-283(E) (2010); WASH. REV. CODE ANN. §§ 13.34.132(4), 13.34.180 (LexisNexis 2010); W. VA. CODE ANN. § 49-6-5b(a)(3) (LexisNexis 2010); WYO. STAT. ANN. § 14-2-309(a)(4) (2010); see also Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1678 (2003) (noting an increase in parental rights termination proceedings for prisoners).

22. JEFFREY H. REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* 78 (2d ed. 1984) ("For the same criminal behavior, the poor are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted; if convicted, more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upper classes." (citation omitted)); Luke, *supra* note 16, at 931; Julie Poehlmann, *Children of Incarcerated Mothers and Fathers*, 24 WIS. J.L. GENDER & SOC'Y 331, 333 (2009).

23. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (as amended in scattered sections of 42 U.S.C. (1997)); see also Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN'S L.J. 41, 44 (2000-2001); Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 177 n.2 (2004).

24. A few states have responded to the growing crisis by extending the period of time in which a child may be in state care before triggering the ASFA deadlines. New York recently amended its parental termination statutes to provide incarcerated parents with additional time to meet child welfare standards. See *infra* note 225 and accompanying text. While it is too soon to assess the impact of this legislation, without more, it likely fails to go far enough to address the underlying substantive issues these families are facing.

25. PATRICIA E. ALLARD & LYNN D. LU, *REBUILDING FAMILIES, RECLAIMING LIVES* 3 (2006), available at <http://www.policyarchive.org/handle/10207/bitstreams/8704.pdf> (finding termination of parental rights of incarcerated parents increased).

26. See Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 81 (2011).

27. Marilyn C. Moses, *Correlating Incarcerated Mothers, Foster Care, and Mother-Child Reunification*, CORRECTIONS TODAY, Oct. 2006, at 98, 98 ("Perhaps most notable is that children of incarcerated mothers were four times more likely to be 'still in' foster

children of incarcerated parents are more likely than other foster care children not to be adopted and to linger in foster care.²⁸ Whether criminal justice and child welfare policies that lead to these results are adequately serving the needs of these families and communities is a question with which feminists should be deeply concerned. The dismantling of these families and communities through the operation of a series of laws and policies should be seen as a call to action for feminists interested in dismantling stereotypes about women, mothering, race, and poverty.

The current approach to parental terminations and incarcerated mothers stems in part from an idealization of motherhood at play in the application of state parental termination standards and federally imposed timelines for families with a child in state care.²⁹ The current approach to parental terminations is based on a traditional notion of mothering that idealizes a nuclear family model and that lays primary responsibility for the family's functioning with the mother.³⁰ At the same time, it demonizes mothers who, unable to provide direct care on their own for a multitude of reasons, need to craft a web of support to assist them to care for their children.³¹ Current approaches to arrest, incarceration, parental rights, and child welfare, are critical of mothers who fall short of a mothering ideal and who need help to fulfill their roles as mothers.³² A critical race feminist approach to the termination of parental rights for incarcerated mothers would make visible the numerous social, legal, and political barriers that coalesce to place an unfair burden on incarcerated mothers. Illuminating the web of stereotypes, institutional disconnects, and economic and community realities reveals that terminating parental rights of incarcerated mothers does not resolve the crises in families and communities hardest hit by the continuing focus on incarceration as a response to non-violent crimes.³³ In addition, severing legal ties between parent and child is simply one more aspect of the current retribution model

care than all other children. These children linger in foster care until they are 18 when they 'age out' of the system."); Diane H. Schetky et al., *Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights*, 18 J. AM. ACAD. CHILD PSYCHIATRY 366, 367 (1979) ("[S]tudies have shown that once a child is placed in foster care, he or she has a 50% chance of remaining there 3 years or longer. Some studies even suggest that a child who has been in foster care for longer than 18 months has a remote chance of being either adopted or returned home." (internal citations omitted)).

28. Moses, *supra* note 27, at 98; Schetky et al., *supra* note 27, at 367.

29. Ross, *supra* note 23, at 187-88.

30. *Id.*

31. See, e.g., *In re Omarian R.*, No. H14CP06008614A, 2008 Conn. Super. Ct. LEXIS 1427, at *34-36 (Conn. Super. Ct. June 2, 2008) (terminating the parental rights of a mother who could not secure support for her son during her incarceration).

32. Kennedy, *supra* note 26, at 80.

33. *Id.*

of incarceration that disproportionately affects women and people of color and removes children not only from their families but from their communities.³⁴

This article argues for an examination of the intersection of criminal justice and child welfare policies from a feminist perspective in order to help support incarcerated mothers and all women who struggle to expand the notion of motherhood to be more inclusive. It suggests that a parental rights approach to parental terminations would operate to empower incarcerated women and their communities by emphasizing the need to provide adequate long term care for their children within their own communities without severing the parent-child relationship. Part I of the article explores the impact of criminal justice policies on families, Part II examines the barriers to preserving families created by federal and state laws and policies and Part III suggests a critical race feminist approach to resolving the tension between preserving parental rights and ensuring the best interests of the child that focuses on the need for community-centered solutions to the current rise in parental terminations.

I. WOMEN, CRIME, & THE CRISIS IN FAMILIES

The involuntary termination of parental rights of prisoners should be viewed as a gendered and political act with community-wide ramifications.³⁵ In assessing the appropriateness of state intervention into families with incarcerated parents, it is important to be realistic about the political and economic circumstances of women who commit crimes and the difficulties they may face raising their families both prior to and during their incarceration.³⁶ In order to effectively serve the needs of poor families, child welfare law and policies should acknowledge the impact on women and their families of the war on crime, mandatory sentencing, and an over-reliance on incarceration as a response to drug crimes and substance abuse.³⁷ The heavy reliance on

34. *Id.* at 113.

35. LEITH MULLINGS, ON OUR OWN TERMS: RACE, CLASS, AND GENDER IN THE LIVES OF AFRICAN AMERICAN WOMEN 93 (1997) (noting that residents of Central Harlem expressed concern about losing the community's children).

36. Kathi J. Kemper & Frederick P. Rivara, *Parents in Jail*, 92 PEDIATRICS 261, 262 (1993) (examining the demographics of incarcerated parents).

37. Joyce A. Ardit, *Locked Doors and Glass Walls: Family Visiting at a Local Jail*, 8 J. OF LOSS & TRAUMA 115, 115 (2003) (emphasizing the challenges of harsh criminal sanctions for nonviolent offenders); Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 179, 190 (2009) (noting the impact of a "high reliance on mass incarceration in response to crime in the United States.");

incarceration as a response to crime has had a deleterious effect on women and children.³⁸ These changes in criminal law and policy and the dependence upon prison as a response to non-violent crimes has helped the numbers of incarcerated mothers in the United States to grow eighty-eight percent from 1991 to 2002 and, as a result, the United States now has “the highest incarceration rate in the world.”³⁹ Although it is still true that most prisoners are male, the number of women in prison has been skyrocketing.⁴⁰ In large part due to the explosion of the female prisoner population, there has been a dramatic increase in the numbers of mothers who are incarcerated.⁴¹ From 1990 to 2007, the number of mothers in federal and state

Kemper & Rivara, *supra* note 36, at 262, tbl. 3 (indicating the primary types of offenses leading to incarceration of mothers); Nekima Levy-Pounds, *Can These Bones Live? A Look At the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 357 (2010) (“The combination of the Anti-Drug Abuse Acts of 1984 and 1986 and the mandatory minimum sentencing scheme comprises the backbone of Congress’s war on drugs. . . . Mandatory minimums caused judges to sentence defendants to an automatic, pre-determined term of imprisonment based upon the type and level of offense committed.” (citation omitted)); Chieko M. Clarke, Comment, *Maternal Justice Restored: Redressing the Ramifications of Mandatory Sentencing Minimums on Women and Their Children*, 50 HOW. L.J. 263, 264 (2006) (describing the “harshness and ineffectiveness of drug sentencing guidelines and conspiracy laws applied to mothers.”). *But see* MUMOLA, *supra* note 16, at 6 tbl. 7 (finding that 24% of incarcerated parents are serving sentences for drug offenses, compared with 17% of non-parents, and approximately 44% of parents in prison were violent offenders); Weber, *supra* note 20, at 644–48 (stating that communities often resist the establishment of drug and alcohol treatment programs).

38. Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1693–94 (2006) (“Over the past three decades, the United States has built a carceral state that is unprecedented among Western countries and in U.S. history.”).

39. Arditti, *supra* note 37, at 115; Christopher J. Mumola, U.S. Dep’t of Justice, *Parents Under Correctional Supervision: Past Estimates, New Measures*, NAT’L INST. ON DRUG ABUSE (Nov. 6, 2006), http://archives.drugabuse.gov/meetings/children_at_risk_/pdf/Mumola.pdf.

40. Philip M. Genty, *Permanency Planning in the Context of Parental Incarceration: Legal Issues and Recommendations*, 77 CHILD WELFARE POL’Y 543, 544 (1998) (“Over the past 15 years, the population of female prisoners has increased by almost 400%, while the male population has increased by more than 200%.”); Luke, *supra* note 16, at 931–932 (affirming the 400% increase in female incarceration rates over the past 20 years); Zina T. McGee et al., *From the Inside: Patterns of Coping and Adjustment Among Women in Prison*, in IT’S A CRIME: WOMEN & JUSTICE 507, 508 (Roslyn Muraskin ed., 4th ed. 2007) (asserting that one in every 109 women are under some form of correctional supervision); Benites, *supra* note 16, at 194 (describing the increase in female state prisons from 1986 to 1991); *see also* MUMOLA, *supra* note 16, at 3 tbl. 3 (examining the characteristics of prison populations).

41. Adela Beckerman, *Mothers in Prison: Meeting the Prerequisite Conditions for Permanency Planning*, 39 SOC. WORK 9, 10 (1994); Kathleen J. Block & Margaret J. Potthast, *Girl Scouts Beyond Bars: Facilitating Parent-Child Contact in Correctional Settings*, 77 CHILD WELFARE 561, 562 (1998); Gottschalk, *supra* note 38, at 1694, 1723.

prison increased 122 percent⁴² while the increase for fathers during the same period was seventy-six percent.⁴³

Current parental termination statutes that apply gender neutral standards of fitness and connect incarceration with fitness ignore the reality that women often have gendered and class-based causes for their imprisonment.⁴⁴ The types of crimes that women commit, according to criminal justice experts, may be intricately related to women's overall economic and political position in society.⁴⁵ Incarcerated women are more likely to be women of color, young, poor, less educated and largely unskilled.⁴⁶ Mothers in prison are often dealing with addiction and report higher rates of substance abuse than incarcerated men.⁴⁷ Incarcerated women are also more likely than imprisoned fathers to be struggling with mental health issues.⁴⁸ Women in prison report significantly higher incidences of child abuse and domestic violence as compared to men.⁴⁹ Typically, the available services are insufficient to meet the needs of these populations.⁵⁰ Women in prison and their families are more adversely affected by the lack of services for alcohol and substance abuse, mental illness, and childhood and domestic abuse.

Imprisoned mothers are less likely to present a danger to their children or society.⁵¹ Studies suggest that while some inmate parents

42. GLAZE & MARUSCHAK, *supra* note 3, at 2.

43. *Id.*

44. Eumi K. Lee, *An Overview of Special Populations in California Prisons*, 7 HAST. RACE & POV. L.J. 223, 239 (2010).

45. MUMOLA, *supra* note 16, at 6 tbl. 7; Ann B. Loper, *How Do Mothers in Prison Differ from Non-Mothers*, 15 J. CHILD & FAM. STUD. 83, 92 (2006) (asserting the possibility that incarcerated mothers' "drug activity was motivated by a need to find funds to support the children"); Luke, *supra* note 16, at 931 ("Many experts in criminal justice assert that the crime committed by women is directly related to their disadvantaged economic position in society . . ."); Travis, *supra* note 16, at 32.

46. Phyllis Jo Baunach, *You Can't Be a Mother and Be in Prison . . . Can You? Impacts of the Mother-Child Separation*, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN 155, 156 (Barbara Raffel Price & Natalie J. Sokoloff eds., 1982); Roslyn Muraskin, *Feminist Theories: Are They Needed?*, in IT'S A CRIME: WOMEN & JUSTICE, *supra* note 40, at 31, 39.

47. JESSICA MEYERSON ET AL., CHILDHOOD DISRUPTED: UNDERSTANDING THE FEATURES AND EFFECTS OF MATERNAL INCARCERATION 7 (2010), available at <http://www.voa.org/Childhood-Disrupted-Report> (2010) (finding that 91% of incarcerated mothers who participated in the study reported a history of substance abuse). Childhood Disrupted is a qualitative study of families affected by maternal incarceration conducted by Volunteers of America, a nonprofit, faith based organization, and Wilder Research. *Id.*

48. *Id.* at 1.

49. McGee et al., *supra* note 40, at 515 ("[A] large number of [respondents] reported having been physically or sexually abused before their incarceration (70%) . . .").

50. Weber, *supra* note 20, at 644-48.

51. Kemper & Rivara, *supra* note 36, at 262 tbl. 3 (noting types of crimes typically committed by incarcerated mothers).

commit violent crimes, the majority, like Caliphah, were incarcerated for non-violent offenses.⁵² Professor Katherine P. Luke maintains that, "[w]omen are more often convicted of low-level drug offenses than men."⁵³ Comparatively few incarcerated women are in prison for crimes involving violence, sexual misconduct, or family-related abuse.⁵⁴ Mothers in prison are less likely to have committed a violent crime than other prisoners and more likely to have committed drug and property crimes than non-mothers.⁵⁵ Based on the higher rates of poverty, their status as single parents, and the high percentage of inmate women who are domestic abuse survivors, it is very likely that their crimes may be related to the stress of raising children, providing for their families, and merely surviving.⁵⁶ The majority of these women—some estimate seventy percent—are mothers of two or three children, most of whom are under the age of thirteen.⁵⁷ These women are also single parents and typically were the primary caretakers for their children prior to being arrested.⁵⁸

52. *In re Omarian R.*, No. H14CP06008614A, 2008 Conn. Super. Ct. LEXIS 1427 at *9 (Conn. Super. Ct. June 2, 2008) (discussing Caliphah's arrests for larceny, welfare fraud, and re-entering the United States after deportation); Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 135 (1999); Kemper & Rivara, *supra* note 36, at 262 tbl. 3 (providing the statistics for types of crimes committed by incarcerated mothers); Luke, *supra* note 16, at 931 ("Most incarcerated mothers are in prison for crimes unrelated to their parenting." (citation omitted)).

53. Luke, *supra* note 16, at 931 ("Many in the criminal justice field have suggested that the aggressive war on drugs and the subsequent mandatory minimum drug sentencing laws are the primary reasons that the rate of female incarceration is increasing at a rate twice that of male incarceration."); *see also* MUMOLA, *supra* note 16, at 5; SNELL, *supra* note 15, at 3 tbl. 2.

54. Kemper & Rivara, *supra* note 36, at 262 tbl. 3. It is also suggested that there is a probable link between recidivist parents and increased potential for family violence. *Id.* at 263.

55. Travis, *supra* note 16, at 33 ("Nearly half (46 percent) of incarcerated fathers were imprisoned for a violent crime, as were one-quarter (26 percent) of the mothers. . . . Nearly one-third of the mothers reported committing their crime to get either drugs or money for drugs . . .").

56. Loper, *supra* note 45, at 92; Luke, *supra* note 16, at 931; Muraskin, *supra* note 46, at 39 (examining various feminist theories about women and crime).

57. Baunach, *supra* note 46, at 156; Garry L. Landreth & Alan F. Lobaugh, *Filial Therapy with Incarcerated Fathers: Effects on Parental Acceptance of Child, Parental Stress, and Child Adjustment*, 76 J. COUNSELING & DEV. 157, 157 (1998). The articulated estimates of the percentage of incarcerated women with children varies. *See* Luke, *supra* note 16, at 932 (placing the number of incarcerated mothers at 75–80% of incarcerated women); Lynn Sametz, *Children of Incarcerated Women*, 25 SOC. WORK 298, 298 (1980) (reporting the number of incarcerated women as anywhere from 42% to 80%).

58. Baunach, *supra* note 46, at 156; Luke, *supra* note 16, at 930 ("Women who become incarcerated are usually poorly educated single mothers from communities of color who are living in poverty and struggling to be the sole financial and emotional providers for their children."); Travis, *supra* note 16, at 32–33.

For many women, a prison sentence creates a serious childcare gap.⁵⁹ The separation due to incarceration results more often in the need for non-parental care for the child since mothers tend to be the child's primary caretaker.⁶⁰ While most of the mothers will be able to arrange childcare by a relative or friend, a significant minority of children end up in state care either as a result of parental behaviors that preceded incarceration or as a result of the incarceration.⁶¹ Children and families affected by maternal incarceration receive little consistent formal assistance in providing care for the children, facilitating a relationship between mother and child, or preparing mothers for their release and successful reintegration into their communities.⁶² As a result of these and other factors, women are uniquely at risk of having their ties to their children permanently severed, and women of color and poor women are in the greatest danger.⁶³ Incarcerated mothers are not necessarily unfit, uncaring, neglectful or abusive.⁶⁴ Yet the predominant approach to dealing with incarcerated mothers and their families is to treat these women as if their convictions are proof of their unsuitability as parents and evidence of the right of the state to intervene in their families.⁶⁵

The impact of criminal justice and child welfare policies on women is just another way in which women are adversely affected

59. See Baunach, *supra* note 46, at 156.

60. Luke, *supra* note 16, at 934; Travis, *supra* note 16, at 33 ("Close to two-thirds (64 percent) of mothers reported living with their children before incarceration, compared with slightly less than half (44 percent) of fathers in 1997.").

61. ZELMA WESTON HENRIQUES, IMPRISONED MOTHERS AND THEIR CHILDREN 61 (1982); MUMOLA, *supra* note 16, at 1 (reporting figures for parents incarcerated in state prison); TIMOTHY ROSS ET AL., VERA INST. OF JUSTICE, HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION 6 (2004), available at <http://www.vera.org/download?file=123/Hard%2Bdata.pdf>; see also BRENDA G. MCGOWAN & KAREN L. BLUMENTHAL, WHY PUNISH THE CHILDREN? A STUDY OF CHILDREN OF WOMEN PRISONERS 56 tbl. 1 (1978); Ellen Barry, *Legal Issues for Prisoners with Children*, in CHILDREN OF INCARCERATED PARENTS 147, 148 (Katherine Gabel & Denise Johnston eds., 1995); Block & Potthast, *supra* note 41, at 562; Lanette P. Dalley, *Imprisoned Mothers and Their Children: Their Often Conflicting Legal Rights*, 22 HAMLINE J. PUB. L. & POL'Y 1, 16 (2000); Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN'S L.J. 217, 226 (2005). But see Moses, *supra* note 27, at 98 (revealing that in the majority of cases, in a study of incarcerated women in Illinois, reviewed children were placed in foster care prior to the mother's first period of incarceration).

62. MEYERSON ET AL., *supra* note 47, at 1.

63. It is important to note, however, that the studies associate recidivism with increased potential for family violence. Kemper & Rivara, *supra* note 36, at 263 tbl. 3.

64. For example, despite the public and media attention paid to mothers who kill their children, the reality is that most imprisoned mothers are not incarcerated for harming their children and statistics show that less than one percent of homicides committed by females involve children less than thirteen years. Loper, *supra* note 45, at 92.

65. Luke, *supra* note 16, at 935.

by gender neutral laws and policies that are developed with men as a starting point. Although men imprisoned for crimes are not privileged in the sense that they are necessarily treated better, women who are subject to the same standards and policies for a variety of reasons are more adversely affected.⁶⁶ The weight of sentencing, incarceration, and separation from their communities and families has a greater and more negative impact on women.

II. BARRIERS TO PRESERVING FAMILY UNITY IN FAMILIES WITH AN INCARCERATED MOTHER

The rising rates of incarceration for women have resulted in a corresponding increase in parental terminations.⁶⁷ Child welfare policies and federal laws which make achieving permanency for children in state care a fundamental goal and the basis for parental terminations do not adequately address the very real and significant barriers to maintaining contact while incarcerated.⁶⁸ For many incarcerated women, being "locked up" creates a childcare gap which many must rely on others to fill.⁶⁹ Approximately eleven percent of mothers

66. Clarke, *supra* note 37, at 264.

67. Ronnie Halperin & Jennifer L. Harris, *Parental Rights of Incarcerated Mothers with Children in Foster Care: A Policy Vacuum*, 30 FEMINIST STUD. 339, 339 (2004).

68. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C. (1997)). A number of states allow courts to consider incarceration or the length of incarceration as a factor without necessarily requiring proof or risk of harm to the child. *See, e.g.*, ALA. CODE § 12-15-319(a)(4) (LexisNexis 2011) (listing "conviction of and imprisonment for a felony" as one factor that can be considered in determining whether to terminate parental rights); ALASKA STAT. §§ 47.10.011(2), 47.10.080(o) (2010) (allowing the state to consider the incarceration of a parent when determining whether a child is in need of aid); COLO. REV. STAT. § 19-3-604(1)(b)(3) (2010) (listing long term confinement of the parent as one basis for finding a parent unfit); DEL. CODE ANN. tit. 13, § 1103(a)(5)(a)(3) (2010) (allowing for the termination of parental rights where the parent failed to plan for the child's needs and is incapable of discharging parental responsibility due to extended or repeated incarceration); 750 ILL. COMP. STAT. ANN. 50/1 (LexisNexis 2010) (noting that being convicted of certain crimes creates a rebuttable presumption of depravity); *see also* ARK. CODE ANN. § 9-27-341 (2010); FLA. STAT. ANN. § 39.806 (West 2010); IDAHO CODE ANN. § 16-2005 (2010); 705 ILL. COMP. STAT. ANN. 405/1-2 (LexisNexis 2010); KAN. STAT. ANN. § 38-2269 (2010); KY. REV. STAT. ANN. § 600.020 (West 2010); LA. CHILD. CODE ANN. art. 1015 (2010); MICH. COMP. LAWS SERV. § 712A.19b (LexisNexis 2010); MONT. CODE ANN. §§ 41-3-423, 41-3-609 (2010); N.H. REV. STAT. ANN. § 170-C:5 (2010); N.D. CENT. CODE §§ 27-20-02, 27-20-44 (2010); OHIO REV. CODE ANN. § 2151.414 (LexisNexis 2010); OKLA. STAT. tit. 10A, § 7006-1.1 (2010); OR. REV. STAT. § 419B.502 (2010); P.R. LAWS ANN. tit. 31, §§ 634a, 634b (2010); R.I. GEN. LAWS § 15-7-7 (2010); S.D. CODIFIED LAWS §§ 26-8A-26.1, 26-8A-27 (LexisNexis 2010); TENN. CODE ANN. § 36-1-113 (2011); TEX. FAM. CODE ANN. §§ 161.001, 161.002(b), 161.007 (West 2010); UTAH CODE ANN. § 78-6-508 (LexisNexis 2010); WYO. STAT. ANN. § 14-2-309 (2010); Ross, *supra* note 23, at 178; Stephanie Sherry, *When Jail Fails: Amending the ASFA to Reduce its Negative Impact on Children of Incarcerated Parents*, 48 FAM. CT. REV. 380, 382-83 (2010).

69. Halperin & Harris, *supra* note 67, at 340.

in prison with a minor child reported having a child in a foster care system.⁷⁰ As primary caregivers, women are more frequently faced with having their children placed in foster care than men, and that number has been increasing over time.⁷¹ Even when extended family is available to help care for these children, the family may be too stressed by economic and other factors to provide adequate care without significant state assistance.⁷² Many children, like Omarian, are placed with relatives when their mother is incarcerated.⁷³ However, much like in Omarian's case, a large percentage of these children eventually end up in state care.⁷⁴

This breach in familial support is primarily an issue for women rather than men (poor women rather than the well-off) and can be exaggerated by substance abuse problems, a history of child or domestic abuse, and mental illness.⁷⁵ One recent study of incarcerated women in Illinois found that the majority of women had a child in state care prior to the woman's imprisonment.⁷⁶ The reliance on foster care prior to incarceration may be related to behaviors and conditions that eventually led to the arrest and incarceration of the mother. Behaviors such as drug use and illegal behaviors which may be related to the underlying causes of these women's incarceration may have led to their children entering foster care some time prior to the women's incarceration.⁷⁷ The child welfare system is ill-equipped to deal with

70. GLAZE & MARUSCHAK, *supra* note 3, at 5; *see also* MUMOLA, *supra* note 16, at 4.

71. Beckerman, *supra* note 41, at 10; *see* Dalley, *supra* note 61, at 14 (noting that when mothers are incarcerated children often end up in foster care).

72. Jeremy Travis et al., *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, URBAN INST. JUSTICE POLICY CTR. (June 2005), http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf; *see also* BERNSTEIN, *supra* note 16, at 144; MUMOLA, *supra* note 16, at 1 (reporting figures for parents incarcerated in state prison); Barry, *supra* note 61, at 148; Beckerman, *supra* note 41, at 10; Block & Potthast, *supra* 41, at 561; Day, *supra* note 61, at 226; Ross, *supra* note 23, at 6.

73. *In re Omarian R.*, No. H14CP06008614A, 2008 Conn. Super. Ct. LEXIS 1427, at *5 (Conn. Super. Ct. June 2, 2008); *see also* State Dep't of Children's Servs. v. V.N., 279 S.W.3d 306, 307 (Tenn. Ct. App. 2008) (stating that the grandmother had custody of the minor child while the mother was in prison, the child was placed with an Aunt when the grandmother was jailed on a DUI charge, and the child was placed in state care when the aunt was arrested for a DUI); Block & Potthast, *supra* note 41, at 562.

74. *See* BERNSTEIN, *supra* note 16, at 144; MUMOLA, *supra* note 16, at 1 (reporting figures for parents incarcerated in state prison); Barry, *supra* note 61, at 148; Beckerman, *supra* note 41, at 10; Block & Potthast, *supra* note 41, at 562; Day, *supra* note 61, at 226; Loper, *supra* note 45, at 91; Ross, *supra* note 23, at 6.

75. Angela Wolf et al., *The Incarceration of Women in California*, 43 U.S.F. L. REV. 139, 142-43 (2008).

76. Moses, *supra* note 27, at 98.

77. Mary Barr, *The Faceless Offender: The Effects of Incarceration on Families, Women, and Minorities*, in 2 ATLA 2001 ANNUAL CONVENTION REFERENCE MATERIALS 2071 (Ass'n of Trial Lawyers of Am. ed., 2001), available at Westlaw ATLA-CLE (stating that 85% of incarcerated women are non-violent drug offenders); Wolf et al., *supra* note 75, at

incarcerated parents and does not provide for long-term childcare needs.⁷⁸ The chronic conditions imprisoned mothers often face and the lack of childcare during periods of incarceration creates a need for extended care for the children of incarcerated mothers.⁷⁹ However, current policies are inapposite to these needs.⁸⁰ These families may be trapped in a cycle of poverty, addiction, child and domestic abuse, and mental illness which makes them vulnerable to arrest and subsequent incarceration.⁸¹ At the same time, federal and state law and policy increase the likelihood that they might lose their parental rights.⁸²

The federal statute designed to make permanency “‘in a safe and stable home’ . . . the goal for all of the children who enter foster care” makes it difficult for incarcerated women to retain their parental rights.⁸³ The Adoption and Safe Families Act of 1997 (“ASFA”) creates incentives and places pressure on states to move children from state care to permanent homes under a time-table.⁸⁴ According to the ASFA, permanency hearings must be held within twelve months of the initial

142 (“Imprisoned women also tend to have . . . significant substance abuse issues . . .”).

78. Halperin & Harris, *supra* note 67, at 340 (asserting that “child welfare policies governing the management and ultimate disposition of these children have not been tailored to the circumstances of parental incarceration”); *see also* Genty, *supra* note 40, at 545 (stating that given the lack of consistent formal mechanisms to track the children of the incarcerated, these statistics may under report the number of children of incarcerated parents who are in foster care).

79. Moses, *supra* note 27, at 98.

80. MUMOLA, *supra* note 16, at 1 (finding that 10% of mothers and 2% of fathers in state prison report a child living in a foster home or agency).

81. Jane C. Murphy & Margaret J. Potthast, *Domestic Violence, Substance Abuse, and Child Welfare: The Legal System's Response*, 3 J. HEALTH CARE L. & POLY 88, 91–95 (1999). The authors note the use of drugs and alcohol by domestic violence victims and “make them particularly unsympathetic parties in abuse and neglect proceedings.” *Id.* at 94; Wolf et al., *supra* note 75, at 143 (finding that women may rely on illegal drugs to “self medicate” for depression, stress, or emotional pain caused by abuse).

82. Nell Bernstein estimates that “thirty-four states now have statutes in place that explicitly cite parental incarceration as a criterion for termination of parental rights.” BERNSTEIN, *supra* note 16, at 150; *see also* Dalley, *supra* note 61, at 16–17. A number of states find incarceration is an insufficient basis for terminating parental rights but still look to efforts made by the parent while imprisoned to maintain the parental bond. It is unclear how realistic these expectations are given the barriers for incarcerated mothers to maintaining contact with their children. *See, e.g.*, *Adoption of Baby Boy A. v. Catholic Soc. Serv. of the Diocese of Harrisburg, Pa., Inc.*, 517 A.2d 1244–45 (Pa. 1986) (holding that a parent’s responsibilities are not tolled during incarceration, and therefore “we must inquire whether the parent has utilized those resources at his or her command while in prison [to continue] a close relationship with the child”); *In re I.G.*, 939 A.D.2d 950, 953 (Pa. Super. Ct. 2007) (“Incarceration alone is not sufficient to support termination.”).

83. Ross, *supra* note 23, at 178 (quoting Executive Memorandum on Adoption and Alternate Permanent Placement of Children in the Public Child Welfare System, 32 Weekly Comp. Pres. Doc. 2513 (Dec. 14, 1996)).

84. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §§ 201–03, 305(b)(2) (7)(A), 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. (1997)).

removal of the child out of the home and into foster care.⁸⁵ Children who are out of the home and in foster care for fifteen of the last twenty-two months must be moved toward permanency, and the ASFA requires states, with some exceptions, to file petitions to terminate parental rights.⁸⁶ State agencies are required to make "reasonable efforts" to reunite families and to maintain family ties.⁸⁷ However, what constitutes "reasonable efforts" is left up to the states and individual state agencies to define.⁸⁸ A number of researchers have been critical of the "reunification" efforts of state social welfare agencies and suggest a lack of sufficient and consistent effort to reunite troubled families.⁸⁹ These concerns are magnified in families in which the separation between parent and child is a result of a parent's incarceration. Far too frequently, there is insufficient support for parents who, because of their incarceration, are unable to follow a permanency plan put in place for them by case workers.

While the ASFA may have been motivated by good intentions to benefit children, the intersection of federal and state law may be responsible for the significant increase in the termination of parental rights of incarcerated mothers.⁹⁰ A significant number of states permit

85. *Id.* § 302. The Act also "awarded states \$4,000 per adoption in excess of the state's average number of adoptions prior to 1997." Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 278 (2003).

86. Adoption and Safe Families Act § 103; Crossley, *supra* note 85, at 278–79 ("A state can be excused from this obligation if: (1) the state has placed the child in the care of a relative; (2) the state can provide a compelling reason for maintaining the parental relationship; or (3) the state has failed to provide reasonable efforts to reunite the family." (citation omitted)). Crossley critiques the "reasonable efforts" exception of the ASFA as "a hollow requirement" since it "stresses terminating parental rights over providing services . . . [and] only applies to the failure to provide those services the state deems necessary," and provides little guidance to the states about how to fulfill the requirement. *Id.* at 292; Halperin & Harris, *supra* note 67, at 340 (arguing that the failure to address the needs of incarcerated mothers with children in foster care compromises the women's rights as parents).

87. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101, 94 Stat. 500; Benites, *supra* note 16, at 205.

88. Benites, *supra* note 16, at 204–05.

89. BERNSTEIN, *supra* note 16, at 151–52.

90. *Id.* at 149.

Many prisoners do stints even for minor infractions that exceed ASFA's six- and fifteen-month time limits. In New York state, more than 90 percent of women convicted of felonies, including low-level nonviolent crimes, will serve at least eighteen months—three months more than the longer of the ASFA time limits. Nationwide, the average term being served by parents in state prison is eighty months.

Id.; Beckerman, *supra* note 41, at 12; Block & Potthast, *supra* note 41, at 562–63; Halperin & Harris, *supra* note 67, at 340 (noting that "the number of children with parents in prison has become an increasingly larger proportion of all children in nonrelative foster care"); Benites, *supra* note 16, at 218. In fact some believe the increase may be as much as

courts to weigh incarceration as a factor in assessing whether parental rights should be terminated.⁹¹ The standards for determining when a parent's right to raise their child should be terminated based on incarceration are varied and vague.⁹² States typically apply a two step process for determining whether to terminate parental rights.⁹³ First, a finding that the parent is unfit or unsuitable is made under a clear and convincing standard.⁹⁴ Then, if a parent is found unfit, most states weigh whether terminating parental rights would be in the child's best interests.⁹⁵ However, states differ sharply in the applicable standard of review and in how fitness is determined.⁹⁶ In states in

250%. Genty, *supra* note 21, at 1678; Travis, *supra* note 16, at 34.

91. See, e.g., K.A.P. v. D.P. and C.P., 11 So.3d 812, 819 (Ala. Civ. App. 2008) ("[T]here has never been a dispute in our cases that current imprisonment extending for a long period during the child's minority may be a sufficient basis for a finding that the imprisoned parent is unable or unwilling to discharge his or her responsibilities to and for the child, especially when the evidence shows that the imprisonment prevents the parent from performing ordinary parental duties."); R.M. v. Dep't of Children & Families, 847 So.2d 1103 (Fla. Dist. Ct. App. 2003).

92. See Kennedy, *supra* note 26, at 97–100.

93. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring))). "[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." Santosky v. Kramer, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting); see also M.L.B. v. S.L.J., 519 U.S. 102, 117–18 (1996) ("[A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest . . ." (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981))). The Supreme Court recognized that it is a parent's fundamental right "to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)); see, e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925) (finding that the Oregon Compulsory Education Act violated parents' "liberty" interests in raising and educating their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the right to raise one's children is "essential").

94. *Santosky*, 455 U.S. at 758 (rejecting New York's use of a "preponderance" standard in parental termination proceedings as a violation of a parent's due process rights).

95. *Id.* at 779–80.

96. See, e.g., COLO. REV. STAT. § 19-3-604(1)(III) (2011) ("The court may order a termination of the parent-child legal relationship upon the . . . [l]ong-term confinement of the parent of such duration that the parent is not eligible for parole for at least six years . . . or . . . if the child is under six years of age . . . , the long-term confinement of the parent of such duration that the parent is not eligible for parole for at least thirty-six months . . ."); KY. REV. STAT. ANN. § 600.020(2)(b) (LexisNexis 2011) ("The parent is incarcerated and will be unavailable to care for the child for a period of at least one (1) year from the date of the child's entry into foster care and there is no appropriate relative placement available

which incarceration of the parent plays a role in determining fitness, there is a lack of consistency among the states as to whether courts should weigh the nature of the crime committed, the length of incarceration, the fact of incarceration, or the parent's efforts to communicate with her child after being imprisoned.⁹⁷ The fitness and the best interests measures used by courts in parental termination proceedings are vague and rely greatly on the exercise of judicial discretion.⁹⁸

Drug laws and harsh sentencing policies for drug-related and nonviolent crimes result in lengthy sentences for a great number of imprisoned women.⁹⁹ Since the average prison sentences are longer than the twenty-two month period specified in the ASFA,¹⁰⁰ the average incarcerated mother may be faced with efforts to terminate her parental rights primarily because of the length of her incarceration alone.¹⁰¹ In fact, one researcher reported a 250 percent increase in cases terminating parental rights due to parental incarceration.¹⁰² While termination statutes are gender neutral and are applied to fathers as well as mothers, they impact women more significantly since women are more likely to be single parents who lived with their children immediately prior to incarceration.¹⁰³ The result is to undervalue the relationship between mother and child and to allow the termination of parental rights to become a *de facto* punishment for the crimes for which she was convicted.¹⁰⁴ The move to permanency

during this period of time."); OHIO REV. CODE ANN. § 2151.414(E)(12)–(13) (LexisNexis 2011) ("The parent is incarcerated . . . and will not be available to care for the child for at least eighteen months . . . [or] [t]he parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child."); OKLA. STAT. tit. 10A, § 1-4-904(12) (2011) (stating that one consideration is "the duration of incarceration and its detrimental effect on the parent/child relationship"); TEX. FAM. CODE ANN. § 161.001(1)(Q)(ii) (West 2011) ("The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence [that the parent has] knowingly engaged in criminal conduct that has resulted in the parent's . . . confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition."); UTAH CODE ANN. § 78A-6-508 (LexisNexis 2011) (terminating parental rights if the parent is incarcerated for such a time "that the child will be deprived of a normal home for more than one year").

97. See BERNSTEIN, *supra* note 16, at 150–51 (discussing differences between the Georgia and New York systems); Dalley, *supra* note 61, at 19–23.

98. See Kennedy, *supra* note 26, at 98–99.

99. MUMOLA, *supra* note 16, at 5; Wolf et al., *supra* note 75, at 140–41.

100. Travis, *supra* note 16, at 34; see also Crossley, *supra* note 85, at 292.

101. BERNSTEIN, *supra* note 16, at 149; see *supra* note 90 and accompanying text.

102. Travis, *supra* note 16, at 34 (citing Genty, *supra* note 21, at 1678).

103. Baunach, *supra* note 46, at 157; Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, in 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH 133, 179 (Michael Tonry ed., 2008).

104. Genty, *supra* note 21, at 1678–79 (noting that family separation is a collateral consequence of incarceration, finding that damage to the family relationship is often an indirect consequence of incarceration).

under the ASFA does not adequately reflect the reality of prison sentences currently imposed and ignores the bonds between mother and child that developed prior to incarceration.

In addition, the fact of incarceration and the length of sentences create barriers to parenting from prison that uniquely affect women. Prison facilities for women are frequently placed farther from their homes than prisons for men.¹⁰⁵ In fact, most incarcerated mothers are imprisoned more than 100 miles from their families, while federal prisoners are housed at far greater distances not infrequently in states other than their home state.¹⁰⁶ This adds to the high cost of staying in touch by making it more expensive and time consuming to visit a female prisoner.¹⁰⁷ In addition, prison and jail facilities are designed with security as a primary goal and do not typically provide convenient and family-friendly visiting areas.¹⁰⁸ Telephone contact is maintained through collect calls at exorbitant rates, and visiting is often made so difficult, expensive, and time consuming that many families cannot afford to do so often.¹⁰⁹

105. BERNSTEIN, *supra* note 16, at 78. Prisoners may also be housed outside the state in which they live and were sentenced. *Id.* at 90–91; *see also* MUMOLA, *supra* note 16, at 5 (observing that 64% of parents incarcerated in state prison and 80% of parents incarcerated in federal prison are housed more than 100 miles from their last place of residence); Travis, *supra* note 16, at 37 (describing the large cost to families of maintaining telephone contact, and new programs that use the internet to improve family contact with prisoners as well as programs to bring children to distant prisons).

106. It is estimated that 60% of parents incarcerated in state prison and 84% of parents incarcerated in federal prison are housed more than 100 miles from their children. *See* MUMOLA, *supra* note 16, at 5.

107. Block & Potthast, *supra* note 41, at 565; Genty, *supra* note 21, at 1675; Denise Johnston & Katherine Gabel, *Incarcerated Parents*, in CHILDREN OF INCARCERATED PARENTS 16–17 (Katherine Gabel & Denise Johnston eds., 1995); Travis, *supra* note 16, at 36; *see also* Murray & Farrington, *supra* note 103, at 188–89 (suggesting that prisoners would be better able to cope after their release if funds were provided during their incarceration to allow family to visit). Bernstein asserts that the cost of collect calls from prison is “as much as twenty times that of standard collect calls” in an arrangement that provides large profits for states as well as the phone companies. BERNSTEIN, *supra* note 16, at 86. Some families have unsuccessfully attempted to sue to obtain compensation for exorbitant telephone fees. *See, e.g.,* Zachary R. Dowdy, *Families of Prisoners Sue State Over Phone Charges*, *NEWSDAY*, Oct. 12, 2009, at A16, available at <http://www.newsday.com/news/region-state/families-of-prisoners-sue-state-over-phone-charges-1.1519293>; *see also* Nicholas H. Weil, *Dialing While Incarcerated: Calling for Uniformity Among Prison Telephone Regulations*, 19 WASH. U.J.L. & POL’Y 427, 431 (2005) (noting the number of Circuit Courts that have heard constitutional claims for inmates’ rights to phone calls); *Keeping in Touch with a Parent in Prison*, *N.Y. TIMES*, Jan. 14, 2006, at A14 (reporting on an effort in Congress to require fair telephone rates in prisons).

108. Arditti, *supra* note 37, at 116; Travis, *supra* note 16, at 36–37. *But see* Tanya Krupat, *Invisibility and Children’s Rights: The Consequences of Parental Incarceration*, 29 WOMEN’S RTS. L. REP. 39, 42 (2007) (discussing enhanced visitation programs in New York, Tennessee, Arkansas, and California).

109. BERNSTEIN, *supra* note 16, at 86; Arditti, *supra* note 37, at 116; Sametz, *supra* note 57, at 298, 301.

A review of cases reveals that courts can be critical of parental efforts to maintain a relationship with their children while incarcerated and have been willing to terminate parental rights in many of these cases.¹¹⁰ In reviewing termination appeals, some courts have found that incarceration does not discharge a parent's statutory obligation to provide for her child with a continuing relationship through communication and visitation.¹¹¹ For example, some state courts have held that incarceration is no excuse for a parent failing to communicate and keep contact with her child.¹¹² Courts reason that a parent who is prevented from maintaining meaningful contact with a child by his incarceration and who thereby risks having his parental rights terminated "cannot object to the natural consequences brought about by his own voluntary commission of criminal acts."¹¹³ Courts are also skeptical of mothers who fail to get the assistance they need until they are imprisoned, reflecting a disconnect between the state's expectations of mothering and the reality of parenting for poor, single mothers.¹¹⁴ For example, in *In the Interest of E.M.H., Minor Child, B.M.B.*, the Iowa Court of Appeals affirmed a decision to terminate a mother's parental rights.¹¹⁵ The court found:

The State offered Brandi a wide array of services, which she did not participate in or respond to, beginning in 2005 with her first child. . . . [S]he did not begin participating in substance abuse treatment until after she was incarcerated. However, once incarcerated, Brandi did become involved in a substance abuse treatment program and participated in a parenting class at the prison.

110. See, e.g., *In re J.L.*, 924 N.E.2d 961, 968 (Ill. 2010). Note that the Supreme Court in *Santosky v. Kramer* requires courts determining parental termination matters to require "clear and convincing" evidence that the parent is unfit. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982). However, the heightened standard alone has been insufficient to prevent terminations primarily due to separation as a result of incarceration.

111. *In re B.F.*, No. 2008 CA 11, 2008 WL 4447700, at *4–5 (Ohio Ct. App. Oct. 3, 2008) (finding clear and convincing evidence that it was in the children's best interest to terminate the mother's parental rights where the mother was incarcerated, could have chosen to participate in a residential treatment program but decided to go to prison, was not due to be released from prison until children would have been in agency's custody for approximately 18 months, and had made little, if any, progress on her case plan).

112. *In re Omarian R.*, No. H14CP06008614A, 2008 Conn. Super. Ct. LEXIS 1427, at *10–12 (Conn. Super. Ct. June 2, 2008).

113. *In re T.G.Y.*, 631 S.E.2d 467, 471 (Ga. Ct. App. 2006); see also *In re T.B.R.*, 480 S.E.2d 901, 906 (Ga. Ct. App. 1997) (holding that "criminal history of repetitive incarcerations for the commission of criminal offenses . . . constitutes an additional factor which may be considered" in determining whether termination of parental rights is in the best interests of the child).

114. See, e.g., *In re B.F.*, 2008 WL 4447700, at *3 (affirming the termination of the parental rights of an imprisoned mother who chose prison in place of treatment and later enrolled in parenting classes in prison).

115. *In re E.M.H.*, No. 08-0701, 2008 WL 2906510 (Iowa Ct. App. 2008 July 30, 2008).

She also obtained her GED and maintained a job at the prison facility. . . . [W]e conclude the State's efforts towards reunification throughout the juvenile court proceedings were reasonable. Brandi, however, did not make it a priority to take advantage of the offered services until it was too late. . . . Brandi's incarceration does not excuse her inability to care for Emily.¹¹⁶

The court makes no examination of whether environmental stressors made it difficult for Brandi to take advantage of the assistance being offered until separated from her community through incarceration.¹¹⁷ The factors that may have led to and fueled her substance abuse are not assessed, nor does the court reckon with the known links between a history of abuse and substance abuse.¹¹⁸ Given the magnitude of the issues and rights at stake, a more thorough inquiry into the causes of Brandi's conduct, and what community resources could be made available to her to keep the family together, should have occurred. Parental termination statutes give judges a great deal of discretion in weighing incarceration as a factor and the decision is "value-laden . . . based on social policy, competing priorities, and law."¹¹⁹ Under this approach, incarceration may be seen as a sign

116. *Id.* at *2–3.

117. *Id.* (containing no discussion of the issue of environmental factors related to substance abuse).

118. See Murphy & Potthast, *supra* note 81, at 91–95; Wolf et al., *supra* note 75, at 143.

119. Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 402 (1996). The amount of time that triggers state intervention varies from state to state and from case to case. See, e.g., COLO. REV. STAT. § 19-3-604(1)(b)(III) (2011) ("The court may order the termination of the parent-child legal relationship upon . . . [l]ong-term confinement of the parent of such duration that the parent is not eligible for parole for at least six years . . . or . . . if the child is under six years of age . . . , the long-term confinement of the parent of such duration that the parent is not eligible for parole for at least thirty-six months . . ."); KY. REV. STAT. ANN. § 600.020(2)(b) (LexisNexis 2011) ("The parent is incarcerated and will be unavailable to care for the child for a period of at least one (1) year from the date of the child's entry into foster care and there is no appropriate relative placement available during this period of time."); OHIO REV. CODE ANN. § 2151.414(E)(12)–(13) (LexisNexis 2011) ("The parent is incarcerated . . . and will not be available to care for the child for at least eighteen months . . . [or] [t]he parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child."); OKLA. STAT. tit. 10A, § 1-4-904(B)(12) (2011) (stating that one consideration is "the duration of incarceration and its detrimental effect on the parent/child relationship"); TEX. FAM. CODE ANN. § 161.001(1)(Q)(ii) (West 2011) ("The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence . . . [that the parent has] knowingly engaged in criminal conduct that has resulted in the parent's . . . confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition."); UTAH CODE ANN. § 78A-6-508(2)(e) (LexisNexis 2011) (allowing termination if parents are incarcerated for such a time "that the child will be deprived of a normal home for more than one year."). Some states allow courts to consider incarceration of a substantial or extended period of time. See, e.g., ARK. CODE ANN. § 9-27-341(b)(3)(B)(viii) (2011) ("The parent is sentenced in a criminal proceeding for a period

of unfitness, abandonment, or neglect, all of which imply the need to terminate parental rights to safeguard the child.¹²⁰ These statutes permit courts to terminate rights of an incarcerated parent when the court determines that "continuing the parental relationship would be harmful to the child," which, under this view, does not require proof that actual contact is detrimental but may presuppose harm based on factors such as the length of the sentence and the amount of contact between the parent and child.¹²¹

The focus in the inquiry in termination proceedings is placed on the culpability of the mother and not the "nexus" between the mother's behavior and any direct harm to the child.¹²² The systemic undervaluation of these connections may be the result of a persistent and narrow mythology that idealizes mothers and that is not

of time that would constitute a substantial period of the juvenile's life."); DEL. CODE ANN. tit. 13, § 1103(a)(5)(a)(3) (2011) ("The [parent] is incapable of discharging parental responsibilities due to extended or repeated incarceration."); FLA. STAT. ANN. § 39.806(1)(d)(1) (LexisNexis 2011) ("The period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years . . ."); LA. CHILD. CODE ANN. art. 1015(6) (2011) ("[T]he parent has been convicted and sentenced to a period of incarceration of such duration that the parent will not be able to care for the child for an extended period of time . . ."); R.I. GEN. LAWS § 15-7-7(a)(2)(i) (2011) (stating that "imprisonment, for a duration as to render it improbable for the parent to care for the child for an extended period of time," is one consideration); S.D. CODIFIED LAWS § 26-8A-26.1(4) (2011) ("[T]he court may find that good cause exists for termination of parental rights of a parent who . . . [i]s incarcerated and is unavailable to care for the child during a significant period of the child's minority, considering the child's age and the child's need for care by an adult.").

120. See, e.g., Johnson, *supra* note 119, at 420–421 (describing a mother who lost parental rights, in part, because of the fact of her incarceration).

121. R.M. v. Dep't of Children & Families, 847 So. 2d 1103, 1104 (Fla. Dist. Ct. App. 2003); K.A.P. v. D.P., 11 So. 3d 812, 819 (Ala. Civ. App. 2008).

[T]here has never been a dispute in our cases that current imprisonment extending for a long period during the child's minority may be a sufficient basis for a finding that the imprisoned parent is unable or unwilling to discharge his or her responsibilities to and for the child, especially when the evidence shows that the imprisonment prevents the parent from performing ordinary parental duties.

Id.

122. See COLO. REV. STAT. § 19-3-604(1)(b)(III) (2011); Thompson v. Tex. Dep't of Family & Protective Servs., 176 S.W.3d 121, 126 (Tex. App. 2004) (citing TEX. FAM. CODE ANN. § 161.001(1)(G) (2002)); see, e.g., *In re C.M.O.*, 901 So. 2d 1168, 1171 (La. Ct. App. 2005) ("[I]mprisonment may not be used as an excuse to escape parental obligations."); Adoption of Serge, 750 N.E.2d 498, 504 (Mass. App. Ct. 2001) ("Physical unavailability of the parent to provide day to day care for the child, including for reasons of incarceration, was relevant evidence of unfitness."); *In re Isabella C.*, 852 A.2d 550, 558 (R.I. 2004) ("[T]he trial justice is not required to consider parole eligibility, he or she is only required to consider the probable duration of imprisonment at the time of the termination." (quoting *In re Mercedes V.*, 788 A.2d 1152, 1153 (R.I. 2001))); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family and Criminal Law*, 83 CORNELL L. REV. 688, 710 (1998) (explaining that in child welfare proceedings, courts focus on "mothers' lifestyles and child-rearing practices rather than on harm to the child").

sufficiently broad to view incarcerated women as good mothers.¹²³ Nor does it seem to leave room for a notion of community mothering or of working within communities to build community-based support for mothers and families in need of assistance. Motherhood has carried a sense of idealism against which many have either rallied or struggled.¹²⁴ It carries with it cultural and political meaning and has been a source of protection and derision for many.¹²⁵ Mothers who are able to mimic the societal ideal of mothering receive the greatest praise and protections although active debate about ideal mothering continues.¹²⁶ Women, even those who work outside the home, are still largely viewed as “the keeper of the home.”¹²⁷ Women who defy cultural norms about mothers and mothering often face criticism and some level of resistance.¹²⁸ Incarcerated women challenge societal norms about mothering and stand counter to generally accepted views about how “good mothers” conduct themselves.¹²⁹

More than women who work or women who in other ways challenge societal perceptions of womanhood, incarcerated women more directly challenge established perceptions about families, parenting,

123. Brenda V. Smith, *Reforming, Reclaiming or Reframing Womanhood: Reflections on Advocacy for Women in Custody*, 29 WOMEN'S RTS. L. REP. 1, 5 (2007) (noting the history of the women's movement and the conflict between the focus on women in prison and motherhood and the failure of women in prison to conform to motherhood ideals).

124. See SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN* 22–23 (2004) (positing that mothers are subject to a heightened standard of conduct that can generate negative responses when those standards are not met); Murphy, *supra* note 122, at 761 (noting the “law’s view of mother as self-sacrificing nurturer and as equal wage earner”).

125. DOUGLAS & MICHAELS, *supra* note 124, at 206.

126. For example, works by a “Tiger Mother” who was seen as too demanding, and another who opted to give up custody of her children to her husband in order to pursue her career when she decided she did not want to be a mother any more, received considerable attention and criticism for their style of mothering. AMY CHUA, *BATTLE HYMN OF THE TIGER MOTHER* (2011) (telling a mother’s story about parenting and raising children the “Chinese” way which involves strict and rigid rules and expectations); Rahna Reiko Rizzuto, *Why I Left My Children*, SALON.COM (Feb. 28, 2011), http://www.salon.com/life/feature/2011/02/28/leaving_my_children. The author gave up custody of her two sons when she realized she did not want to be a mother anymore and preferred instead to focus on her career. *Id.*; Kate Zernike, *Retreat of the ‘Tiger Mother,’* N.Y. TIMES, Jan. 16, 2011, at ST1 (noting the controversial nature Chua’s book).

127. ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 15–16 (1989); Jill Laster, *Time Crunch for Female Scientists: They Do More Housework than Men*, CHRON. HIGHER EDUC. (D.C.), Jan. 19, 2010, <http://chronicle.com/article/Female-Scientists-Do-More/63641/>; Deborah Solomon, *Women’s Work: What Men Won’t Do*, WALL ST. J., Aug. 6, 2009, <http://blogs.wsj.com/economics/2009/08/06/womens-work-what-men-wont-do/#> (discussing a Bureau of Labor Statistics Report showing women do more household work than men).

128. DOUGLAS & MICHAELS, *supra* note 124, at 22–23.

129. *Id.*

and care-taking.¹³⁰ These women are geographically distant from their children.¹³¹ Visitation and physical contact with their children is out of their control and, according to studies, is often inconsistent at best but more often minimal or nonexistent.¹³² Communicating through telephone calls is an expensive and limited option, and incarcerated women may find sending cards and letters a difficult and ineffective means of expressing their complicated feelings for their children and about the situation in which they find themselves.¹³³ Women who commit crimes, "are viewed as more pathological" than men who commit crimes.¹³⁴ Women who commit crimes, are incarcerated, and fail to maintain regular communication with their children may find it difficult to overcome common understandings of how "good mothers" behave. Even today, the role of mother is still a defining characteristic for women, and mothers who fall short of expectations are viewed negatively.¹³⁵ Women are judged, in part, by their devotion and commitment to their children and are not good mothers until they devote most of their time and energy to being mothers.¹³⁶

Termination proceedings result in an evaluation of mothering that holds incarcerated women to a high and unrealistic standard and creates timetables for addressing shortcomings that fail to provide sufficient time to address the difficult and wide-ranging issues these women may be facing. In addition, the models of mothering to which these mothers are held may reflect standards to which all parents should aspire but are ones to which most mothers probably fall short. For example, in *In re J.L.*, in upholding the termination of the parents' parental rights, the Illinois Supreme Court noted transgressions such as leaving a "knife on the table with the point outward," allowing the children to run "around wildly" and failing to acknowledge children when they wanted to talk about their day at school.¹³⁷ While perhaps demonstrating errors in judgment, such

130. See STACEY L. SHIPLEY & BRUCE A. ARRIGO, *THE FEMALE HOMICIDE OFFENDER: SERIAL MURDER AND THE CASE OF AILEEN WUORNOS* xii-xiii (2004).

131. BERNSTEIN, *supra* note 16, at 78; MUMOLA, *supra* note 16, at 5.

132. BERNSTEIN, *supra* note 16, at 78-81 (noting obstacles to family friendly visits, including bulletproof glass, long lines, and a lengthy approval process, and humiliating screening processes); Block & Potthast, *supra* note 41, at 566 (indicating that most visiting rooms are uncomfortable and may heighten children's anxieties about the visit).

133. See Block & Potthast, *supra* note 41, at 563-64; Luke, *supra* note 16, at 934; Sametz, *supra* note 57, at 299.

134. SHIPLEY & ARRIGO, *supra* note 130, at 11.

135. See DOUGLAS & MICHAELS, *supra* note 124, at 22-23.

136. *Id.*

137. *In re J.L.*, 924 N.E.2d 961, 964-65 (Ill. 2010).

parenting failures seem to fall short of demonstrating a lack of fitness to parent. Each of the transgressions cited by the court almost certainly would not lead to a termination of rights had the mother not had a history of incarceration, mental illness and domestic violence.¹³⁸

The mother in *In re J.L.* admittedly falls far from an ideal of mothering, but whether her failures should result in the permanent severing of her parental ties to her children, and whether a middle class woman would be held to the same standard, are important questions that the court in the case is free to ignore, since the prevailing standard does not require such an inquiry.¹³⁹ At issue in the appeal was whether the parents had been given sufficient time to address their parenting deficiencies, particularly given the mental illness and abuse issues facing the mother.¹⁴⁰ Even though the court acknowledges the difficulties an incarcerated parent may face in trying to improve his or her parenting skills, it concludes that the time period a parent is given to make such progress is not tolled by the time spent in prison.¹⁴¹ In fact, the court ultimately finds that “in the interest of judicial economy,” it would not remand the case to be decided, and it instead upheld the parental termination.¹⁴²

The mother in *In re J.L.*, like many incarcerated women, is dealing with a number of complicated and interrelated psychological and mental health problems that are impossible to address in the time periods prescribed by state and federal standards.¹⁴³ Incarcerated women engage in high levels of drug and alcohol use and frequently have histories of mental illness and abuse.¹⁴⁴ These women may find it difficult to overcome addiction and mental health issues within the strict federal and state time-lines. In addition, they face the challenge of countering the negative stereotypes about the kinds of individuals who commit crimes, use drugs, and “allow” themselves to be abused.

Women of color may be most impacted by the intersection of criminal law, child welfare policies and stereotyped thinking:

[W]omen of color remain the most impacted by increased levels of mass incarceration. These women are more often mothers of

138. See, e.g., *In re Faith B.*, 832 N.E.2d 152, 159 (Ill. 2005) (holding that one factor indicating unfitness [mental illness] is not sufficient to terminate parental rights).

139. *In re J.L.*, 924 N.E.2d at 966–67.

140. *Id.* at 964–65.

141. *Id.* at 968–69.

142. *Id.* at 970.

143. Wolf et al., *supra* note 75, at 142–43.

144. *Id.*

dependent children. . . . While they are more likely to be nonviolent offenders, they are still viewed as a threat to the moral conscience of the dominant society since they fail to meet the standards of appropriate motherhood.¹⁴⁵

These women in prison face an additional layer of struggle against stereotypes about women of color and poor women as mothers.¹⁴⁶ Stereotypes about race, ethnicity, and class may affect perceptions of mothering.¹⁴⁷ Black mothers are often viewed as failing to live up to society's image of the ideal mother.¹⁴⁸ Black mothers are devalued and fall short of the American ideal of motherhood; this has its roots in slavery. As Patricia Hill Collins notes, African-American women often struggle against:

[t]he traditional family ideal [that] assigns mothers full responsibility for children and evaluates their performance based on their ability to procure the benefits of a nuclear family household. Within this capitalist marketplace model, those women who 'catch' legal husbands, who live in single-family homes, who can afford private school and music lessons for their children, are deemed better mothers than those who do not.¹⁴⁹

The devaluation of the images of poor mothers and mothers of color creates opportunities for the vague standards for fitness and best interest to adversely affect poor families and families of color.¹⁵⁰ The stigma associated with being convicted of a crime, spending time in prison, being a drug user, being poor, and/or being Black or Latina may affect how these women are perceived and the extent to which

145. McGee et al., *supra* note 40, at 510 (citing Sharp & Ericksen, *Imprisoned Mothers and Their Children*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (B.H. Zaitzow & J. Thomas eds., 2003)).

146. See Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 108 (1993) (exploring the effects of gender, race, class, and nature of crime on criminal convictions) [hereinafter Roberts, *Motherhood and Crime*]; Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 10–11 (1993) [hereinafter Roberts, *Racism and Patriarchy*].

147. Roberts, *Motherhood and Crime*, *supra* note 146, at 137 ("Society is less likely to identify with criminal mothers than with other classes of criminals. . . . Women violate gender norms when they engage in violence or abandon their children in pursuit of crime.").

148. Murphy, *supra* note 122, at 691 ("Poor minority women frequently bear the punishment for deviating from the stereotype of the ideal mother, whereas white middle-class and wealthy women reap the rewards for being good mothers.").

149. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 182 (2nd ed. 2000).

150. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 585 (1997); Lenore M. McWey et al., *Parental Rights and the Foster Care System: A Glimpse of Decision Making in Virginia*, 29 J. FAM. ISSUES 1031, 1047 (2008); see also Kennedy, *supra* note 26, at 103.

they are viewed as capable mothers. These mothers may find it difficult to convince first social workers and later judges that they are fit or suitable parents and often fall short of the "best interests" idealism inherent in the fitness and best interests tests applied in termination cases.¹⁵¹ The result of devaluing motherhood by those in the margins—women of color, poor women, incarcerated women—and applying a best interests idealism to termination proceedings results in greater numbers of terminations. However, the children affected do not necessarily find permanent homes, and the number of children in foster care continues to climb.¹⁵²

Incarcerated mothers are in greater need for assistance since their children are more adversely affected by the incarceration of their mothers than their fathers.¹⁵³ Children of incarcerated mothers may be at greater risk of troubled behavior than the children of incarcerated fathers, putting these children at greater risk for engaging in criminal behavior and continuing a legacy of involvement with the criminal justice system.¹⁵⁴ Moreover, studies seem to support the idea that these children may be more easily pulled into a pattern of "intergenerational" crime¹⁵⁵ and are more likely to engage in illegal activity.¹⁵⁶ It is unclear whether this is the result of exposure to a parent's criminal behavior, poverty and related environmental stresses, or other factors.¹⁵⁷ Women of color are at the greatest risk of having their children placed in foster care.¹⁵⁸ Children of color are removed from

151. See Kennedy, *supra* note 26, at 103.

152. See Moses, *supra* note 27, at 98 ("Perhaps most notable is that children of incarcerated mothers were four times more likely to be 'still in' foster care than all other children. . . . These children linger in foster care until they are 18 when they 'age out' of the system."); Schetky et al., *supra* note 27, at 367 ("[S]tudies have shown that once a child is placed in foster care, he or she has a 50% chance of remaining there 3 years or longer. Some studies even suggest that a child who has been in foster care for longer than 18 months has a remote chance of being either adopted or returned home." (citation omitted)); Steven M. Cytryn, Note, *What Went Wrong? Why Family Preservation Programs Failed to Achieve their Potential*, 17 CARDOZO J.L. & GENDER 81, 92–94 (2010) (discussing foster care from its inception and the growth of foster care over time).

153. Wolf et al., *supra* note 75, at 143.

154. Landreth & Lobaugh, *supra* note 57, at 157–58.

155. Halperin & Harris, *supra* note 67, at 339.

156. Landreth & Lobaugh, *supra* note 57, at 158; Luke, *supra* note 16, at 933; see also Murray & Farrington, *supra* note 103, at 162.

157. See BERNSTEIN, *supra* note 16, at 146–47. Foster care placement triggers the operation of federal provisions that set time requirements for severing the legal ties between parent and child. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C. (1997)); Murray & Farrington, *supra* note 103, at 163, 171 (claiming that parental imprisonment is a predictor but does not necessarily have a causal effect).

158. McGee et al., *supra* note 40, at 510.

their homes and placed in foster care at a disproportionate rate.¹⁵⁹ These children are also more likely to have their legal ties with their parents severed.¹⁶⁰ A number of scholars have taken note of the disproportionate involvement of the state in families of color and poor families and the greater rates at which their children are removed from their homes and placed in foster care.¹⁶¹ It is not clear that the children, their parents, or their communities are well served by these efforts, and it is instead more likely that the permanent removal of these children does significant harm.

Many of the women adversely affected by the intersection of the increasing reliance on incarceration and the effort to achieve permanency for children face a host of social and economic issues which make it difficult for them to provide for their children.¹⁶² In fact, many come from communities that lack adequate housing, schools, jobs, and drug and alcohol treatment centers.¹⁶³ The result is that these women may find it difficult to provide for basic needs and get the assistance they need to cope with the stresses of living at the margins of society in a manner that would satisfy child welfare agencies and judges in parental terminations proceedings.¹⁶⁴ A disconnect exists between what the federal and state standards and goals for child welfare expect of these mothers and what they can reasonably provide under the circumstances and in the communities in which they often live.

An example of the creation of standards for parenting that contribute to the termination of the parental rights of women who live with incarceration as a fact of life is presented in *State of Tennessee Department of Children's Services v. V.N.*, which upholds the termination of parental rights of an incarcerated mother one month before her release from prison.¹⁶⁵ The case is illustrative of the disconnect

159. See Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172-73 (2003); Antoinette Greenaway, Note, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT'L BLACK L.J. 247, 256-57 (2002-2004).

160. Roberts, *supra* note 159, at 172-73; Greenaway, *supra* note 159, at 256-57.

161. Roberts, *supra* note 159, at 172-73; Greenaway, *supra* note 159, at 256-57.

162. REIMAN, *supra* note 22, at 77-110 (noting that for the same criminal behavior, the poor are more likely to be arrested, charged, convicted, sentenced to prison, and are given longer prison terms than members of the middle and upper classes); see also Acoca & Raeder, *supra* note 52, at 137; John Hagan & Ronit Donovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 134-37 (1999); Luke, *supra* note 16, at 930; Poehlmann, *supra* note 22, at 333, 339; Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. INST. JUST. & INT'L STUD. 261, 261 (2007); Travis, *supra* note 16, at 33-35.

163. Weber, *supra* note 20, at 644-48.

164. Roberts, *supra* note 159, at 172-73; Greenaway, *supra* note 159, at 256-57.

165. *State Dep't of Children's Servs. v. V.N.*, 279 S.W.3d 306, 323 (Tenn. Ct. App. 2008).

between state expectations for incarcerated parents and what it is likely these parents can accomplish in the relatively short period of time allotted under the federal standards.¹⁶⁶ The mother in *V.N.* had been incarcerated twenty times between 2002 and 2008.¹⁶⁷ Although the opinion is unclear as to the nature of all of the mother's convictions, it does indicate that the mother had been jailed at various times for theft, driving on a suspended license, possession of drug paraphernalia, and violating probation.¹⁶⁸ At the parental termination trial, a Department of Children's Services representative testified that the mother failed to comply with the permanency plans which required her to, *inter alia*, complete alcohol and drug treatment, maintain an alcohol and drug-free lifestyle, be able to provide financially for herself and her child, have stable employment, and have safe and independent housing.¹⁶⁹ According to the opinion, the mother was incarcerated for the majority of the time, and, during the five months she was not in prison, she failed to obtain a job or independent housing.¹⁷⁰ The court further noted that the mother had some visits with the child but the mother attended only some of them and failed to attend a birthday party for the child for which she had promised to bring a cake and presents.¹⁷¹

The mother's presentation of evidence suggested a more complicated and frustrating picture. Her testimony suggests failures in the system, particularly a lack of resources to support her family and to allow her to be a responsible caring parent.¹⁷² The mother testified that she did not understand

the things she was supposed to do under the permanency plan and she stated: "... I've never had to depend on myself so really, I didn't even know what place to work. . . . There were services offered to me, but it wasn't really nothing to help me. They never really showed me the way in doing anything. I mean, they would explain stuff to me, but I've, I've [sic] never really had to depend on myself before, so I really didn't know what to do."¹⁷³

From the mother's perspective, there was a clear disconnect between what social services expected in order for her to maintain her parental rights and her understanding of how to carry out the permanency plan. Although the perception of social services may have been that

166. *Id.* at 312-13.

167. *Id.* at 312.

168. *Id.* at 311.

169. *Id.* at 309.

170. *Id.* at 310.

171. *V.N.*, 279 S.W.3d at 310.

172. *Id.* at 312-13.

173. *Id.* at 312.

the failure to visit her child indicated a lack of interest in care-taking, the mother's testimony says more about inadequate resources and assistance than a lack of care.¹⁷⁴ When asked about whether she cared for the child, why DCS was unable to get in touch with her, and missing visitations, the mother testified that she did not have a driver's license, car, means of transportation, place to live, job or a phone.¹⁷⁵ She further indicated that she did not have a GED.¹⁷⁶ When asked why she failed to attend her child's birthday party, the mother testified, "Cause I didn't have nothing to give her, and I didn't want to, I didn't, I was embarrassed. I didn't show up, 'cause I didn't want to hurt her no more 'cause I didn't have nothing. I had no job. I had no way of getting her anything."¹⁷⁷

It is clear from the case that the mother's addiction, lack of education, and joblessness reflects more than mere individual failings. The mother seems to have lacked basic understandings of how to proceed to put her life back together and was without family resources to call upon to assist her.¹⁷⁸ The case reveals a family in crisis, a family in which at least three female members of the family were in jail at the same time for addiction-related behaviors.¹⁷⁹ The case reveals a family unable to provide the kind of support that would prevent the State from intervening to care for the child.¹⁸⁰ The mother explained that her failure to more aggressively seek treatment for her drug addiction was partly due to her reliance on her mother to care for her child.¹⁸¹ As a result, her mother's and later her sister's incarceration created a childcare gap she was unable to fill and allowed the state to step in and put her child in foster care.¹⁸²

The case also reflects the impact of inadequate education, patterns of work in underground markets that can often occur in poor communities, and the effect of intergenerational crime.¹⁸³ Although the mother had neither a high school diploma nor formal employment, she had an arrangement with a friend, Mr. Landers, to provide services for him since he was disabled.¹⁸⁴ Apparently, the mother had done general housekeeping for Mr. Landers in the past and he

174. *Id.* at 312–13.

175. *Id.*

176. *Id.* at 313.

177. *V.N.*, 279 S.W.3d at 313.

178. *Id.* at 312–14.

179. *Id.* at 307.

180. *Id.* at 307–8.

181. *Id.* at 313–14.

182. *Id.* at 307–8.

183. See Justin Brooks & Kimberly Bahna, "It's a Family Affair"—*The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 280 (1994).

184. *V.N.*, 279 S.W.3d at 311–12.

testified that when she was released from jail, the mother could live on the second floor of his five-bedroom house and could clean his house, do laundry, wash dishes, and cook for him in exchange for a wage.¹⁸⁵ The juvenile court noted this job arrangement but expressed concern that there had "been no proof of what her actual pay was or pay stubs or bank account records."¹⁸⁶ An informal arrangement to provide services in exchange for room, board, and pay is not uncommon in poor communities.¹⁸⁷ The court, however, searching for more familiar and concrete evidence of employment, found Mr. Landers's representations insufficient proof of the mother's efforts to secure a job.¹⁸⁸ The State's expectations for mother as expressed by DSS and the judge may reflect a disconnect between the standard being applied and what realistically can be achieved by these parents.

Perhaps the greatest divide in the opinion is the conclusion upholding the decision that terminating parental rights was in the child's best interest.¹⁸⁹ The result ignores less draconian possibilities urged by the mother during the hearing.¹⁹⁰ During her testimony, the mother indicated a strong desire to maintain a connection with her child, stating:

The only thing I ask of the Court whatsoever is that I can get visitation with her. . . . I just want to see her if I'm doing good. . . . I mean, I can ask for another chance but I'm sure I'm not going to get [sic], but I want to do everything I can to see my kids because I love my kids.¹⁹¹

The court, reaching for an all or nothing solution, nonetheless concluded that the mother abandoned her child and that termination of parental rights would be in the child's best interests.¹⁹² This case, like many others, would probably have benefitted from efforts to achieve a middle ground short of termination that might have allowed future contact between the child and his biological family.

185. *Id.* at 312.

186. *Id.* at 314.

187. See SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* xiii (2006) (reporting the use of a barter system in poor communities as common); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 74–75 (1996).

188. *V.N.*, 279 S.W.3d at 321.

189. *Id.* at 323 (reaching this conclusion based on findings that the juvenile court did not err in finding clear and convincing evidence to terminate mother's parental rights for abandonment and for failing to substantially comply with the permanency plan despite the State's reasonable efforts to assist the mother).

190. *Id.* at 323.

191. *Id.* at 313.

192. *Id.* at 323.

III. DEVELOPING A CRITICAL RACE FEMINIST APPROACH TO RESOLVING THE TENSION BETWEEN PRESERVING PARENTAL RIGHTS AND ENSURING THE BEST INTERESTS OF THE CHILDREN

There is some disagreement about how best to balance the myriad interests at stake when a mother who is incarcerated is unable to provide family care for her children.¹⁹³ Some focus on prioritizing the child's need for permanence as a primary goal.¹⁹⁴ The Adoption and Safe Families Act is designed to advance this goal, and a number of scholars support its implementation.¹⁹⁵ Some advocate for greater intervention in families where there is the potential for abuse and highlight the need to prioritize a child's right to safety and permanence over a parent's right to the care and custody of her children.¹⁹⁶ Others would prefer to blunt the harsh edge of laws and policies that result in parental terminations and look for ways to balance the needs of the children of incarcerated parents with the rights of these parents.¹⁹⁷ At the far end of this view, advocates focus more on the need to support parental rights and a mother's right to parent her children.¹⁹⁸

193. See Virginia Sawyer Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. DAVIS J. JUV. L. & POL'Y 29, 42 (2001) ("[A] large percentage of families involved in the Child Protection System are living in poverty."). A number of scholars have addressed the issue of whether children have constitutional rights to maintain or sever parental ties. These scholars query whether children have a constitutional right to bond with their parents. See Johnson, *supra* note 119, at 399–400 (noting that case law reveals that some states are "parents' rights jurisdictions" while others are "child focused jurisdictions" and that "[t]ermination of parental rights is always a sensitive and difficult issue"); ROSS ET AL., *supra* note 61, at 1 (stating that a child may have an interest in preserving a relationship with a neglectful parent); see also James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 446–47, 476 (2008).

194. Proponents of the ASFA and short deadlines for terminating parental rights assert that doing so is in a child's best interest. There is a vigorous debate about this issue in legal scholarship. See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 461 (1983); Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 658 (1999).

195. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C. (1997)).

196. On a related point, Professor Dwyer also advocates for anticipatory terminations in families with a history of abuse. See Dwyer, *supra* note 193, at 472–73.

197. See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 710, 758 (2001). Appell states that the "suggestion that the parental rights doctrine or family privacy is anachronistic may not comport with the experiences of the thousands of families who are deprived of the recognition and protection the doctrine affords." *Id.* at 758; see also Philip Genty, *Some Reflections About Three Decades of Working with Incarcerated Mothers*, 29 WOMEN'S RTS. L. REP. 11, 14 (2007).

198. Appell, *supra* note 197, at 787–88.

While many mothers in parental termination proceedings, like the mother in *State of Tennessee Department of Children's Services v. V.N.*, profess a desire to parent their children at a parental termination hearing, critics would argue that their failure to maintain regular communication with their children means that terminating parental rights would serve their child's best interest.¹⁹⁹ The principal objections to a parental rights approach to thinking about parental terminations are based in concern for the welfare of the child.²⁰⁰ The assumptions are that parental terminations can serve a child's best interest by severing a legal relationship with a parent who has either directly or indirectly harmed the child, and that a continued legal relationship between parent and child will further cause harm to the child.²⁰¹ These hypotheses are related to the idea that incarcerated women have failed in the past and will likely continue to fail to adequately mother their children.²⁰²

While incarcerated mothers may fall short of the ideal, and barriers exist to parenting from prison, these obstacles need not necessarily result in inadequate parenting. Despite the difficulties created by the distance and restrictions of prison life, an approach that errs on the side of parental terminations fails to account for the continued mother-child bond that often persists despite the obstacles created by incarceration.²⁰³ Although incarceration presents a number of obstacles to parenting, it does not necessarily break the psychological bond between the parent and the child.²⁰⁴ The separation due to incarceration is trying for all parents but may be particularly difficult and painful for mothers.²⁰⁵ These women often report sharing a bond with their children and, for many, their incarceration is the first major separation they've experienced.²⁰⁶ Mothers in prison report feelings of guilt, anxiety, and sadness, and are often distressed over their lack

199. See *In re Omarian R.*, No. H14CP06008614A, 2008 Conn. Super. Ct. LEXIS 1427, at *30–32 (Conn. Super. Ct. June 2, 2008).

200. Appell, *supra* note 197, at 732.

201. *Id.* at 788–89.

202. Baunach, *supra* note 46, at 155–56.

203. *Id.* at 158.

204. BERNSTEIN, *supra* note 16, at 71; DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* 95 (2004) (noting that “there is nothing *intrinsically* different about these families [with an incarcerated parent] that sets them apart”); Block & Potthast, *supra* note 41, at 563; Erika London Bocknek et al., *Ambiguous Loss and Posttraumatic Stress in School-Age Children of Prisoners*, 18 J. CHILD & FAM. STUD. 323, 330 (2009); Loper, *supra* note 45, at 84.

205. See Lee, *supra* note 44, at 239 (addressing the “fragmenting effect” of maternal incarceration on families); see also Block & Potthast, *supra* note 41, at 561; Luke, *supra* note 16, at 930.

206. Baunach, *supra* note 46, at 157.

of parenting skills and concern over their children's well-being.²⁰⁷ Incarcerated mothers assert that being separated from children is a source of significant stress.²⁰⁸ Dr. Baunach finds that "the psychological repercussions may be analogous to those resulting from other forms of loss, such as death or divorce. The grief response emitted by inmate-mothers may be characterized by emptiness, helplessness, anger and bitterness, guilt, and fear of loss or rejection."²⁰⁹

Many incarcerated women try to maintain contact and desperately want to be "good mother[s]" despite the barriers to maintaining contact.²¹⁰ "Inmate mothers . . . possess positive parenting attitudes (love, caring, guidance) equivalent to those of mothers who are not incarcerated,"²¹¹ and their self-esteem is often tied up with their role as mother.²¹² Others conclude that "children are important to incarcerated mothers: a majority of these mothers apparently want to develop a sense of responsibility as parents," and "one of the greatest impacts of the separation is to heighten this interest in children."²¹³

Many imprisoned mothers "attempt to maintain some semblance of the mother role" while in prison.²¹⁴ Moreover, they report that they "plan to reunite with [their] children following release from prison," seeing their "separation as only temporary."²¹⁵ As a result, the most damaging aspect of parental incarceration may be the threat of termination of parental rights.²¹⁶

The ASFA and state termination standards fail to adequately account for the mother-child bonds and the barriers and stereotypes incarcerated mothers face.²¹⁷ The ASFA should be amended to prohibit the application of a statutory time-line to termination proceedings. Short of doing so, however, parental incarceration should be an exception to the application of the ASFA time-line, except perhaps for cases involving violence. In addition, courts should be prohibited from considering incarceration as a factor in determining parental termination cases. Under this approach, timetables and standards of review would be adjusted to make it more possible for parents to retain

207. *Id.* at 157-58; Block & Potthast, *supra* note 41, at 563 (citing L. LeFlore & M.A. Holston, *Perceived Importance of Parenting Behaviors as Reported by Inmate Mothers: An Exploratory Study*, 14 J. OFFENDER COUNSELING SERVICES & REHABILITATION 5 (1989)).

208. Loper, *supra* note 45, at 84.

209. Baunach, *supra* note 46, at 157-58.

210. *Id.* at 155.

211. Block & Potthast, *supra* note 41, at 563-64.

212. *Id.* at 563.

213. Baunach, *supra* note 46, at 165.

214. *Id.* (citation omitted).

215. *Id.*

216. *Id.* at 157.

217. See Benites, *supra* note 16, at 196.

their parental rights even when the family is adversely affected by incarceration.²¹⁸

Some scholars and activists, including Phillip Genty, have been critical of the impact of prison policies and the ASFA on incarcerated parents and have eloquently argued for caution in weighing incarceration as a factor in determining parental fitness, stating that there is a need to press further and remove incarceration which is unrelated to a parent's role as parent from any consideration in a termination proceeding.²¹⁹ Under this view, courts would be prohibited from drawing any negative inferences from parental incarceration in determining parental termination, regardless of the length of incarceration and, as proposed by Richard Palmer three decades ago, incarceration would not be considered abandonment.²²⁰ Instead, the state would be required to show proof of direct harm or an attempt to harm the child, sibling, other parent, or caretaker.²²¹ Courts would adopt a "nexus"

218. For example, Professor Appell suggests that the current standard of review in parental termination cases is too high and instead proposes a minimal care standard urging courts to focus on whether a parent could provide minimal care and make decisions for the child as measure of fitness. Appell, *supra* note 150, at 610 (discussing minimally adequate care standard).

219. Genty, *supra* note 197, at 12 (noting the ASFA makes termination of parental rights more likely for incarcerated parents); Philip M. Genty, *The Inflexibility of the Adoption and Safe Families Act and its Unintended Impact Upon the Children of Incarcerated Parents and their Families*, CHILD WELFARE 360° 10 (2008) (stating that the ASFA make it difficult for incarcerated parents to retain their parental rights because the length and condition of the separation from their children is out of their control); Richard D. Palmer, Comment, *The Prisoner-Mother and Her Child*, 1 CAP. U. L. REV. 127, 129 (1972).

220. Palmer, *supra* note 219, at 137.

221. The court's consideration of harm to or an attempt to harm a child's siblings, other parent or caretaker is consistent with the scope of protections provided in many states in domestic violence and abuse cases. In fact, in assessing the relevance of a parent's incarceration or conviction of a crime in termination proceedings, a number of states focus on the nature of the acts committed and the extent to which those acts clearly demonstrate actual or potential harm to the child or the child's parent and parental unfitness. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533 (2010) (stating a parent must be convicted of a felony that is "of such a nature as to prove the unfitness of that parent to have future custody and control of the child"); CAL. WELF. & INST. CODE §§ 361.5, 366.26 (West 2010) (stating a parent must be "convicted of a felony indicating parental unfitness"); GA. CODE ANN. § 15-11-94 (2010) (stating that incarceration has "a demonstrable negative effect on the quality of the parent-child relationship"); *see also* D.C. CODE §§ 16-2353, 16-2354 (2010); IND. CODE § 31-34-21-5.6 (2010); IOWA CODE §§ 232.102, 232.111, 232.116 (2010); ME. REV. STAT. tit. 22, § 4055; MD. CODE. ANN., FAM. LAW § 5-525.1 (LexisNexis 2010); MISS. CODE ANN. §§ 43-21-603, 93-15-103 (2011); MO. REV. STAT. § 211.447 (2010); NEB. REV. STAT. § 43-292 (2010); NEV. REV. STAT. §§ 128.105, 128.106, 432B.393 (LexisNexis 2000); N.H. REV. STAT. ANN. §§ 169-C:24-a, 170-C:5 (2010) (incarceration and abuse or neglect of a child); N.J. STAT. ANN. §§ 30:4C-11.2, 30:4C-15 (West 2010); N.C. GEN. STAT. § 7B-1111 (2010); 23 PA. CONS. STAT. § 2511 (2010); S.C. CODE ANN. § 63-7-2570 (2009); VT. STAT. ANN. tit. 15A, § 3-504 (2010); VA. CODE ANN. § 16.1-283 (2010); WASH. REV. CODE §§ 13.34.132, 13.34.180 (LexisNexis 2010); W. VA. CODE § 49-6-

test approach similar to that used in custody matters and require that any conduct, including conduct relating to the fact of incarceration, have a demonstrably direct negative impact on the child before being considered in a termination hearing.²²² This approach would raise the bar for parental termination, shift the burden from the incarcerated parent, and fix the presumption in favor of preserving parent-child ties.

In order to further protect incarcerated mothers, the ASFA and parental termination statutes that consider length of separation between parent and child as a factor should be limited to voluntary separations and should be prohibited from characterizing imprisonment as a voluntary separation.²²³ Some jurisdictions have begun efforts to adjust termination standards and proceedings to be more realistic about the needs of incarcerated families.²²⁴ One approach, recently adopted by New York, has been to expand the period of time during which an incarcerated mother may meet the permanency plan goals set for her by the state's child welfare agency.²²⁵ The recently

5 (2010); WIS. STAT. § 48.415 (LexisNexis 2010); see also Michelle Oberman, *Judging Vanessa: Norm Setting and Deviance in the Law of Motherhood*, 15 WM. & MARY J. WOMEN & L. 337, 337, 359 (2009) (exploring the way the law distinguishes "good" mothers from "bad" mothers).

222. Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 861–62 (1997).

223. A number of states allow courts to consider incarceration or the length of incarceration as a factor without necessarily requiring proof or risk of harm to the child. See, e.g., ALA. CODE § 12-15-319(4) (LexisNexis 2010) (listing "conviction of and imprisonment for a felony" among factors that courts can consider in making parental termination decisions); ARK. CODE ANN. § 9-27-341 (2010) (terminating parental rights if it is in the child's best interest and "parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life"); COLO. REV. STAT. § 19-3-604(1)(b)(3) (2010) (listing "long term confinement of the parent" as a basis for finding a parent unfit); DEL. CODE ANN. tit. 13, § 1103(a)(5)(a)(3) (2010) (terminating parental rights if parent failed to plan for child's needs and "respondent is incapable of discharging parental responsibilities due to extended or repeated incarceration"); 750 ILL. COMP. STAT. ANN. 50/1 (West 2011) (listing certain acts that create a rebuttable presumption that a parent is unfit, including convictions for certain crimes); see also ALASKA STAT. §§ 47.10.011, 47.10.080, 47.10.086, 47.10.088 (2010); FLA. STAT. ANN. § 39.806 (LexisNexis 2010); IDAHO CODE ANN. § 16-2005 (2010); 705 ILL. COMP. STAT. ANN. 405/1-2 (LexisNexis 2010); KAN. STAT. ANN. §§ 38-2269, 38-2271 (2010); KY. REV. STAT. ANN. §§ 600.020, 610.127 (West 2010); LA. CHILD CODE ANN. arts. 672.1, 1015 (2010); MICH. COMP. LAWS SERV. § 712A.19b (LexisNexis 2011); MONT. CODE ANN. §§ 41-3-423, 41-3-609 (2010); N.H. REV. STAT. ANN. § 169-C:24-a, 170-C:5 (2010); N.D. CENT. CODE §§ 27-20-02, 27-20-44 (2010); OHIO REV. CODE ANN. § 2151.414 (West 2010); OKLA. STAT. tit. 10A, § 7006-1.1 (2010); OR. REV. STAT. § 419B.502 (2009); P.R. LAWS ANN. tit. 31, §§ 634a, 634b (2010); R.I. GEN. LAWS § 15-7-7 (2010); S.D. CODIFIED LAWS §§ 226-8A-26.1, 26-8A-27 (2010); TENN. CODE ANN. § 36-1-113 (2010); TEX. FAM. CODE ANN. §§ 161.001, 161.002(b), 161.007 (West 2010); UTAH CODE ANN. § 78A-6-508 (West 2010); WYO. STAT. ANN. § 14-2-309 (2010).

224. Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1019 (2001).

225. N.Y. SOC. SERV. LAW § 358-a (Consol. 2011).

passed bill recognizes the additional difficulties incarcerated parents face in trying to maintain contact with their children from prison.²²⁶ The legislation is a step in the right direction in acknowledging the barriers incarcerated parents face in attempting to maintain contact with their children. Efforts to help incarcerated mothers address the underlying behaviors (such as substance abuse which precipitated the parent's imprisonment) and the range of emotional and psychological issues (such as histories of abuse and mental illness) with which they are often dealing should continue. Unless legislatures simultaneously address issues of poverty, unemployment, and inadequate educational systems and provide effective childcare networks for these women whose circumstances may take years to address, these efforts are likely to have a widespread impact on the rising rates of parental terminations of incarcerated parents.

Another important area of inquiry would be the disproportionate impact of current laws and policies on women of color and poor women.²²⁷ Professor Twila Perry calls for gathering the stories of women of color whose parental rights have been terminated.²²⁸ Professor Patricia Williams makes the point that redistributing resources so that blacks can afford to raise their own children may be preferable to placing black children in white homes because they "do better."²²⁹ It may be possible to develop a community-based fostering system that allows children whose parents are incarcerated to stay in their communities, receive adequate parenting, and maintain their ties with their parents. In fact, the notion of "community mothering" has long been a part of African-American traditions and communities and could be the basis of reconceiving the foster care system.²³⁰ As Professor Patricia Hill Collins has noted, "[i]n many African-American communities . . . women-centered networks of community-based child care have extended beyond the boundaries

226. The Adoption and Safe Families Act Expanded Discretion Bill gives agencies more flexibility to maintain children's ties to an incarcerated parent, with the hope of reunification after release. See *Policy Agenda 2011: Protecting Bonds Between Mothers and Children*, CORRECTIONALASS'N.Y., http://www.correctionalassociation.org/policy_agenda/protecting_mothers_and_children.htm (last visited Feb. 13, 2012).

227. Professor Roberts proposes an anti-subordination approach that focuses on the concrete effects of government policy on the substantive conditions of the disadvantaged. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1471, 1477 (1991).

228. Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 155, 156, 158-59 (1998).

229. Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, in CRITICAL RACE FEMINISM 151, 153 (Adrien Katherine Wing ed., 1997).

230. Arlene E. Edwards, *Community Mothering: The Relationship Between Mothering and the Community Work of Black Women*, 2 J. MOTHERHOOD INITIATIVE FOR RES. & COMMUNITY INVOLVEMENT 87, 88 (2000).

of biologically related individuals to include 'fictive kin.'"²³¹ These caregivers were neither necessarily related to the children who found themselves in their care nor did they displace the natural parent. This "other-mother" tradition, as noted by Professor Collins,²³² is based in the theory that "because all children must be fed, clothed, and educated, if their biological parents could not discharge these obligations, then some other member of the community should accept that responsibility."²³³ Under this view, community mothers could receive priority as foster care mothers and be paid a premium for caring for their children in need and keeping them in their own communities.²³⁴ This allows a continuity of care in a familiar community for the child but can also serve to empower the foster mother and the community.²³⁵ Collins notes that mothering and other-mothering has a history of leading to community activism.²³⁶ Being a mother is often a source of power and can be a "symbol of hope."²³⁷ She asserts that by rejecting separateness and individual interests, community mothering supports connectedness with others and common interests.²³⁸ This has the result of fostering a greater sense of community and can be a source of achieving status in the community.²³⁹ On the other hand, terminating parental rights not only removes children from their communities but disempowers the mother whose only source of potential power or status may be as a mother, and disempowers communities by removing their youth.

A systematic process for educating judges, caseworkers, and members of the bar about the issues facing incarcerated mothers might similarly help dull the force of the ASFA and state parental termination provisions. The need for judges to have a more realistic view of the nature of the relationship between parent and child, and the limitations on maintaining contact presented by incarceration, begs for rethinking the relationship between child welfare and penal systems. Judicial education could include sessions on the impact of

231. COLLINS, *supra* note 149, at 179 (citation omitted).

232. *Id.*

233. *Id.* (citing MULLINGS, *supra* note 35).

234. *See id.* at 180.

235. *Id.* at 192.

236. *Id.*

237. COLLINS, *supra* note 149, at 198; Roberts, *Motherhood and Crime*, *supra* note 146, at 132 ("Black women historically have experienced motherhood as an empowering denial of the dominant society's denigration of their humanity.").

238. COLLINS, *supra* note 149, at 192.

239. *See* Perry, *supra* note 228, at 117. As part of a discussion of transracial adoption the author notes that "[f]or Black women, part of the symbolic cultural meaning of mothering is tied to race." *Id.*; *see also* Roberts, *Motherhood and Crime*, *supra* note 146, at 132 ("Bearing and nurturing Black children ensure the life of the Black community.").

domestic violence, childhood abuse, mental health issues, and growing up in poor communities on women and on the abilities of mothers to parent effectively. Women from impoverished communities may have an even more difficult and stressful role in mothering their children than mothers with ample financial means and resources.²⁴⁰ Many of these women come from communities which present greater challenges to mothering and caring for their children than many other mothers. For example, one study of Central Harlem notes that "[w]omen [in Harlem] spend an extraordinary amount of time escorting children, limiting their movement, and trying . . . to keep them away from the violence. . . ." ²⁴¹ Ensuring that judges and case-workers have a greater understanding of the struggles families face before, during, and after incarceration might lead to results that more often than not lead to the preservation of families.

One of the common criticisms of parental incarceration is that the criminal justice and child welfare systems fail to work together.²⁴² From the point of arrest, through processing the accused and imprisonment, the criminal justice, sentencing, prison, and child welfare systems should coordinate their efforts to ensure safe care-taking and planning for children.²⁴³ Most police departments have yet to develop concrete policies for responding to and dealing with situations in which children are present at the point of arrest.²⁴⁴ States should mandate minimum standards for arrest procedures in which children are involved which would, at a minimum, require the child welfare agency to be informed of the presence of children and to consult with the arrested parent immediately after the arrest to ensure the safe placement of the child with a relative or close friend if at all possible. In the absence of a family or friend with whom the child could be placed, the child welfare agency should secure a safe foster care placement for the children in or near the child's community and with an expectation that siblings would not be separated. Moreover, standards with regard to returning the children to their families as soon as possible, assistance with maintaining contact between the parent and child, and minimum levels of communication between the social worker and parent should be required. The state should impose standards on child welfare agencies for the facilitation of communication between parent and child. Balancing the responsibility between the

240. COLLINS, *supra* note 149, at 197.

241. MULLINGS, *supra* note 35, at 93.

242. Roberts, *supra* note 224, at 1019.

243. See Acoca & Raeder, *supra* note 52, at 136-37; Poehlmann, *supra* note 22, at 339.

244. BERNSTEIN, *supra* note 16, at 259.

parent and the child welfare agency would be more effective in ensuring communication between parent and child and is a more realistic approach given the significant barriers parents in prison face in communicating with their children.

Family courts hearing termination proceedings should adopt a more holistic integrated approach to resolving termination matters. Termination proceedings should not proceed without the presence of the parent whose rights are in issue and those parents should be guaranteed a right to counsel.²⁴⁵ Perhaps a lesson can be learned from the integrated approach taken in domestic violence cases in rethinking the interface between family courts and imprisoned parents faced with parental terminations.²⁴⁶ In some jurisdictions, domestic violence cases may be assigned to a single judge under the "one family one judge" philosophy.²⁴⁷ The integrated approach to domestic violence was adopted in recognition of the myriad social and legal issues facing families experiencing intimate partner violence.²⁴⁸ Judges are able to see, understand, and help resolve the criminal, family, and matrimonial matters.²⁴⁹ These judges bring together the lawyers, social workers, law guardians, and child welfare personnel who are working with these families in order to provide a coordinated response to a problem that affects all members of the family.²⁵⁰

An integrated family court could be authorized to require the appearance of the parent, child welfare, a law guardian, the family, and a trained social worker from the penal facility before proceeding with a termination matter. Judges would have a more realistic view of the relationship between parent and child, as well as the obstacles to communicating faced by incarcerated parents. Adopting an integrated approach to sentencing and parental terminations, at least in some subset of cases, would facilitate the coordination of distinct agencies. This approach involves "taking the whole family to court" in recognition of

245. Kennedy, *supra* note 26, at 121; *see also In re Eileen R.*, No. 508828, 2010 N.Y. App. Div. LEXIS 9516, at *4 (N.Y. App. Div. Dec. 23, 2010) (reversing termination of parental rights in light of the lower court's failure to consider the incarcerated parents' request to testify by telephone).

246. Integrated domestic violence courts are only one example of a generation of specialized courts which attempt to deal more holistically with legal issues by addressing not only the range of legal problems presented in a case but often the social and psychological as well. *Key Principles*, N.Y. STATE UNIFIED CT. SYS., http://www.nycourts.gov/courts/problem_solving/IDV/key_principles.shtml (last visited Feb. 13, 2012).

247. *Overview Family Court*, COMMONWEALTH OF KY., <http://courts.ky.gov/circuitcourt/familycourt/> (last visited Feb. 13, 2012).

248. *Id.*

249. *Id.*

250. *Key Principles*, *supra* note 246.

the fact that when a parent is sentenced, so too is the entire family.²⁵¹ Mothers who are incarcerated may be faced with trying to find housing and care for their children, may have drug and alcohol problems, or may have a host of other social and economic problems that a judge can weigh in considering sentencing, diversion, and treatment programs for the incarcerated mother.²⁵²

CONCLUSION

Incarcerated mothers remain a vilified group, and their children and families are largely invisible. Reform is needed so as to stem the tide of parental terminations due to incarceration and to support communities that are losing their youth to foster care and inter-generational crime. Greater assistance is needed for families facing economic stress and incarceration in order to limit family disruption. A more realistic view of what mothering entails in the face of poverty, addiction, and incarceration would better serve mothers and children, like Caliphah and Omarian.

251. Taking seriously the concern about the impact of incarceration on families and children would also mean rethinking much of the criminal justice system, including mandatory minimums, and providing greater latitude in sentencing non-violent offenders. While addressing these issues goes beyond the scope of this article, one approach could include permitting sentencing judges to receive "family impact statement[s]" and reports from child welfare workers about the family. BERNSTEIN, *supra* note 16, at 261.

252. *Id.*